IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased, by and through MAYOLA WILLIAMS, Personal Representative,	) Vol. 23-A
Plaintiff,	) Circuit Court) No. 9705-03957
vs.	)
PHILIP MORRIS INCORPORATED,	)
Defendant.	)

PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 8:45 a.m., Wednesday, March 24, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

APPEARANCES:

James Coon, Attorney at Law,
William Gaylord, Attorney at Law,
Ray Thomas, Attorney at Law,
Christopher Tauman, Attorney at Law,
appearing on behalf of the Plaintiff;

James Dumas, Attorney at Law,
Michael Harting, Attorney at Law,
Billy Randles, Attorney at Law,
Walter Cofer, Attorney at Law,
Jay Beattie, Attorney at Law,
Pat Sirridge, Attorney at Law,
appearing on behalf of the Defendant.

* * *

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By Mr. Gaylord

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WITNESS INDEX

REBUTTAL WITNESSES:
FOR THE Plaintiff: Direct Cross Redirect
Dr. Samuel Hammar
presented via videotape 16 (not reported)

* * *

(March 24, 1999)

* * *

A.M. P R O C E E D I N G S

* * *

THE COURT: We are now ready to take up the objections that were made during the perpetuation testimony of Dr. Samuel Hammar, which happened here in the courtroom last night.

I have been handed a transcript that has four tabs. I understand there are additional objections, but they were effectively cured by rephrasing and otherwise during the testimony. But I'll take up first the four tabs that I know, and then if there are additional ones please do let me know.

MR. TAUMAN: Just for my purposes, do your tabs start at Page 84?

THE COURT: No. I have Page 62. I have Page 85.

MR. TAUMAN: Okay.

62, I notice that, although Mr. Gaylord made an objection, he in the next line he waived it. So, we breezed through that one.

THE COURT: All right.

MR. TAUMAN: Actually, the one on 85

starts at Page 84, Line 2. I may not have marked that.

THE COURT: All right.

Let me try to read a little further ahead than that or behind than that and see what I can

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6 figure out what's going on.
7 Is this in Cross-Examination then?
8 MR. TAUMAN: That's correct.
9 MR. SIRRIDGE: Yes, it is.
10 MR. TAUMAN: I don't mean to interrupt
11 your reading, but it appears Mr. Sirridge
12 rephrased that question there; that took care of
13 any objections.
14 THE COURT: So, you don't need me to
15 consider 84 or 85?
16 MR. TAUMAN: Correct.
17 THE COURT: Okay. I won't.
18 MR. TAUMAN: Well, on Page 85, Line 18, I
19 think. I'm sorry, Page 85, Line 18 is the first
20 substantive, and I believe that the one later on
21 Page 85 and the one on 86 and 88 all are the same
22 basic objection.
23 THE COURT: Okay.
24 Then somebody needs to help me understand
25 what has transpired in the testimony from Pages 1

6

1 through 84. Maybe someone can summarize for me
2 the gist of the direct testimony and then where
3 we are at this point, because the objection is
4 it's beyond the scope.
5 MR. TAUMAN: Right.
6 THE COURT: And I can't do that without
7 actually reading all of it to see if it is or
8 isn't.
9 MR. TAUMAN: The direct testimony,
10 basically, the way I understand it, and I was in
11 and out of the courtroom myself, but Mr. Sirridge
12 was here and can certainly comment on that, was a
13 process of diagnosis of the tumor of
14 Mr. Williams, and that process continued sort of
15 step by step. There were specific questions
16 about what others had said, including
17 Dr. Franzini, in reports, and Dr. Gould from the
18 stand.
19 The objection is based on the meandering
20 into the issue of radiology and what the
21 radiology showed and what the radiologist may
22 have said. So, that is our scope of the Direct.
23 MR. SIRRIDGE: Actually, the
24 Cross-Examination at that point was not specific
25 to the case, not specific to the case's

7

1 radiology, but I was pointing out points in
2 Dr. Hammar's book where they are saying, by
3 radiology, it's difficult to diagnose tracheal
4 tumors. I wasn't speaking about his review of
5 the records or anything that he had testified to.
6 We were talking about tracheal tumors and the
7 fact that this was located in the trachea. My
8 point was: Isn't this difficult to diagnose by
9 radiology?
10 THE COURT: Boy, that is a point that has
11 been covered.
12 MR. SIRRIDGE: That is a point that has
13 been covered, but I was going into specifically
14 it's material out of his textbook.
15 THE COURT: At this point --
16 MR. SIRRIDGE: Especially after he takes

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17 his textbook and shows it to the jury and talks
18 about how impressive it is. I was just going to
19 use it that way.
20 THE COURT: All right.
21 So, that is the gist of these objections
22 on the 80 series?
23 MR. SIRRIDGE: I believe they are all
24 relating to that same passage.
25 THE COURT: Well, I'm inclined to

8

1 overrule the objection, but let me suggest this.
2 If it's important to the Plaintiff,
3 important enough to exercise the kind of care,
4 I'm willing to do the following, which is I'll be
5 paying attention to the evidence as it comes in.
6 And if you will be tracking it, as well, I'll be
7 ready to rule on the objection when it comes, if
8 you want. And then we'll see where we need to
9 skip ahead to, if, in fact, a few pages need to
10 be deleted.
11 MR. TAUMAN: That sounds fine. And it
12 may be, Mr. Thomas will be here during this time,
13 and maybe we will not press the objection.
14 THE COURT: Okay. Well, let's wait and
15 see how that develops, but I'll be happy to rule
16 on it, once I know what the Direct really was.
17 MR. TAUMAN: We also, Your Honor, have
18 two exhibits which I understand Mr. Sirridge did
19 not object to for admission that were used in the
20 deposition. Exhibit 185 are the histology
21 slides.
22 MR. SIRRIDGE: That he used?
23 MR. TAUMAN: Yes.
24 MR. SIRRIDGE: I'm going to object to
25 that as being -- it's okay that he showed them

9

1 during the deposition, but later in the
2 Cross-Examination he told me he didn't know who
3 made them. So, there is certainly no foundation.
4 THE COURT: I'll take up the objection
5 after I have heard his testimony.
6 MR. TAUMAN: Okay.
7 The second is --
8 MR. DUMAS: Excuse me, Chuck. I
9 apologize having to interrupt you.
10 I would have an additional objection on
11 those photographs, if they are as I understand
12 them to be, and I was -- this is filtered to me.
13 If those are photographs of the cytology
14 slides, I would object because I believe we had
15 an understanding that the cytology, if it was
16 going to be made available to any expert, would
17 also be made available to us. And I would need
18 to confirm that. I cannot flatly and
19 unequivocally represent that to the Court, but
20 that is my very distinct memory. And I believe
21 there's a letter confirming that.
22 MR. TAUMAN: I agree. I just assumed
23 that you had those.
24 MR. DUMAS: No. I tried get it and you
25 objected. Well, we can take that up later.

10

1 THE COURT: No. We need to talk about it

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2 now because we are about to put the witness on
3 the stand in the jury's presence.
4 I want you two to go talk about it now
5 out in the hall and then come back in.
6 MR. TAUMAN: Well, we can take care of
7 the other exhibit, the packet of medical records,
8 between 1991 and 1996, and I thought that those
9 were stipulated to or allowed.
10 MR. SIRRIDGE: Those are fine.
11 THE COURT: All right.
12 Gentlemen, go out in the hall, please.
13 MR. TAUMAN: Thank you.
14 MR. THOMAS: Good morning.
15 THE COURT: Good morning.
16 Just so you are aware, we have been
17 talking about objections raised during Dr.
18 Hammer's deposition, and we have been told by
19 both sides of the case all but the objections
20 starting on Page 85, having to do with questions
21 by Mr. Sirridge to the witness about statements
22 of the witness's radiology textbook, all but
23 those objections are not before me for ruling.
24 The people are satisfied they can just be played
25 out.

11

1 And as to those objections starting on
2 Page 85, I'm going to need to rule at the time
3 because I can't tell whether it's beyond the
4 scope of direct or an unfair approach until I
5 know what's happened up front.
6 What I told Mr. Tauman was that if it's
7 important for Plaintiff to get a ruling on that,
8 that you'll need to interrupt playing it before
9 we get to Page 85 so that I'll have an
10 opportunity to make the ruling. And then if I
11 was allowing that, you might decide it's just not
12 worth the interruption. So, it would be your
13 call.
14 So, I'll just wait for a sign from you.
15 If you want it stop it, we'll stop it. We'll
16 take it up in chambers. And if you don't, we
17 won't.
18 MR. THOMAS: All right. I assume that
19 I'll be the video technician. So, I'll stop it.
20 THE COURT: Okay.
21 Now we need to wait for counsel to get
22 back to tell me what the issue is about this
23 cytology problem.
24 Mr. Tauman, are you all resolved?
25 MR. TAUMAN: Well, I am in the sense that

12

1 --
2 THE COURT: Well, don't tell me about
3 that other issue until they get back.
4 MR. TAUMAN: Well, just for the purposes
5 of your consideration, we are withdrawing our
6 introduction of the histology slides.
7 THE COURT: All right. That will be
8 fine.
9 MR. TAUMAN: They may have another issue
10 to raise regarding this. They are huddling now.
11 THE COURT: Okay.
12 MR. TAUMAN: Your Honor, I think we are

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13 resolved on the transcript and the exhibits. We
14 have withdrawn 185. 186 has been allowed.
15 THE COURT: Confirmation for the record,
16 please?
17 MR. SIRRIDGE: Yes, Your Honor.
18 THE COURT: Thank you.
19 MR. THOMAS: Why don't we show the Court
20 the originals. Do you have an extra copy which
21 you can use or shall we share mine?
22 MR. RANDLES: We can share yours. I
23 don't have mine.
24 THE COURT: All right.
25 We are ready for the jury, counsel; is

13

1 that right?
2 MR. SIRRIDGE: Yes, Your Honor.
3 MR. THOMAS: How would the Court like to
4 handle the resting of the Plaintiff's rebuttal
5 case?
6 THE COURT: Well, as soon as this tape is
7 over we are going to take a break, and then you
8 are going to tell me if there's anything else you
9 are the offering, and then you are going to
10 announce to the jury that you have rested.
11 MR. THOMAS: Okay.
12 THE COURT: And the defense, during that
13 break, is also going to confirm that we have got
14 everything, every exhibit in that they want in,
15 because we are going to have a committment that
16 both sides have rested.
17 MR. THOMAS: All right.
18 THE COURT: That is how we'll handle it,
19 and we'll do it in the jury's presence, either
20 immediately before the argument -- we'll see how
21 long it's going to take.
22 MR. THOMAS: Okay.
23 THE COURT: Okay.
24 All right. We are ready for the jury.
25 Good morning, jurors.

14

1 JURORS: Good morning.
2 THE COURT: Here is the plan. We have
3 one final live witness. Well, live in the form
4 of a witness who testified last night on video.
5 And that is going to be played for you this
6 morning. It takes about two hours.
7 There is a pretty natural breaking point
8 between the Direct and the Cross-Examination
9 about half way through. So, you're looking at
10 another approximate hour of testimony.
11 If at that point anybody thinks you need
12 to have the morning recess, meaning you cannot
13 wait through another hour, just let us know at
14 that point. We'll break from the tape, and we'll
15 take the morning recess. Otherwise, we'll play
16 it through until it's finished. When it's
17 finished, we'll obviously have a recess.
18 Then there is some settling of exhibits
19 and so forth on both sides that I need to handle,
20 and the parties will be formally rested by the
21 time that is over.
22 There is also some more legal work I have
23 to do. So, it may be that effectively you'll be

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24 breaking for noon around 11:15 or 11:30, with a
25 plan to come back around 1:00 o'clock. That is

15

1 my thinking right now, but I'll firm that up as
2 the morning goes on.
3 And then when you come back, I'll be
4 starting by giving you instructions on the
5 verdict forms that you will be using to
6 deliberate.
7 And following that, we'll have the
8 Plaintiff's opening closing argument. And that
9 will be the day's work. That is our plan for
10 now.
11 So, I understand the next witness is a
12 physician, Samuel Hammar, called on behalf of the
13 Plaintiff.
14 MR. THOMAS: Yes.
15 THE COURT: Go ahead, Mr. Thomas.
16 Before we go any further, I should
17 probably let the jury know that this was a
18 videotape perpetuation deposition that was taken
19 in the courtroom last night after everybody went
20 home.
21 THE COURT: Thank you.
22 A JUROR: It is too loud.
23 THE COURT: Too loud, Mr. Thomas.
24 * * *
25 (Whereupon, the videotaped testimony of

16

1 Dr. Samuel Hammar was played in open court,
2 which testimony was not court reported.)
3 * * *
4 * * *
5 THE COURT: We are on the record.
6 Mr. Thomas.
7 MR. THOMAS: Thank you.
8 Your Honor, as you know, the Plaintiff
9 has objected as outside the scope to
10 Mr. Sirridge's Cross-Examination beginning on
11 Page 85. Let's see. I'm sorry.
12 THE COURT: It's on Page 85.
13 MR. THOMAS: Yes, beginning on Page 85.
14 And in regard to questions that will relate to
15 diagnosis through radiology, as well as
16 discussion from the radiology section in the
17 textbook, which was not written by Dr. Hammar.
18 The examination continues, I read it
19 correctly, through Page 88, Line 14, when
20 Mr. Sirridge then transitions away from the
21 radiology, after the answer, which I would
22 suggest is characteristic of this area, that
23 Dr. Hammar states at Page 88, Line 13:
24 "You know, I don't have enough experience
25 to know that one way or the other regarding the

17

1 tracheal tumors evident or not evident in a
2 percentage of routine chest radiographs."
3 Mr. Sirridge then transitions to
4 hemoptysis, which I believe would be back within
5 --
6 MR. SIRRIDGE: Were are you reading?
7 MR. THOMAS: Yes. It's Page 88, Line 15.
8 Mr. Sirridge then transitions into

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9 hemoptysis, which I think would be back within
10 the scope of the direct examination.
11 THE COURT: Let me now read from --
12 MR. SIRRIDGE: Can I add one comment?
13 THE COURT: As soon as I have read it.
14 MR. SIRRIDGE: Okay.
15 THE COURT: Give me just a minute,
16 please.
17 Mr. Thomas, is there anything else you
18 want to say for the record?
19 MR. THOMAS: No, Your Honor, not on this
20 point.
21 THE COURT: The objection is overruled.
22 Anything before we bring in the jury?
23 MR. THOMAS: No, Your Honor.
24 THE COURT: Okay.
25 Let me get them or get Dan to get them,

1 and I'll be right back.
2 * * *
3 (Whereupon, the proceedings continued, in the
4 jury's presence, in open court, as follows:)
5 * * *
6 THE COURT: All right.
7 Mr. Thomas, continuing, with the video,
8 please.
9 Jurors, there are -- there have been
10 objections you have heard. There are additional
11 objections. All have been overruled.
12 * * *
13 (Whereupon, the videotaped examination of
14 Dr. Samuel Hammar resumed.)
15 * * *
16 * * *
17 THE COURT: We are on the record.
18 Mr. Thomas.
19 MR. THOMAS: Thank you.
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21 has objected as outside the scope to
22 Mr. Sirridge's Cross-Examination beginning on
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6 correctly, through Page 88, Line 14, when
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8 radiology, after the answer, which I would
9 suggest is characteristic of this area, that
10 Dr. Hammar states at Page 88, Line 13:
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12 to know that one way or the other regarding the
13 tracheal tumors evident or not evident in a
14 percentage of routine chest radiographs."
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16 hemoptysis, which I believe would be back within
17 --
18 MR. SIRRIDGE: Were are you reading?
19 MR. THOMAS: Yes. It's Page 88, Line 15.

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20 Mr. Sirridge then transitions into
21 hemoptysis, which I think would be back within
22 the scope of the direct examination.
23 THE COURT: Let me now read from --
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25 THE COURT: As soon as I have read it.

1 MR. SIRRIDGE: Okay.
2 THE COURT: Give me just a minute,
3 please.
4 Mr. Thomas, is there anything else you
5 want to say for the record?
6 MR. THOMAS: No, Your Honor, not on this
7 point.
8 THE COURT: The objection is overruled.
9 Anything before we bring in the jury?
10 MR. THOMAS: No, Your Honor.
11 THE COURT: Okay.
12 Let me get them or get Dan to get them,
13 and I'll be right back.
14 * * *
15 (Whereupon, the proceedings continued, in the
16 jury's presence, in open court, as follows:)
17 * * *
18 THE COURT: All right.
19 Mr. Thomas, continuing, with the video,
20 please.
21 Jurors, there are -- there have been
22 objections you have heard. There are additional
23 objections. All have been overruled.
24 * * *
25 (Whereupon, the videotaped examination of

1 Dr. Samuel Hammar resumed.)
2 * * *
3 MR. THOMAS: It sounds like Mr. Sirridge
4 may have lost his microphone or maybe we lost our
5 sound.
6 THE COURT: Stop the tape, please.
7 MR. THOMAS: Yeah.
8 THE COURT: Just stop the tape.
9 Can we simply go back a few lines and
10 just read the question and answer form now to the
11 end? It's not that much longer.
12 MR. COFER: Sure.
13 THE COURT: I'm asking first can we.
14 MR. COFER: I'm sorry.
15 MR. THOMAS: I believe we have a
16 transcript.
17 THE COURT: May we do this?
18 MR. THOMAS: Yes.
19 THE COURT: Mr. Cofer, do you want to
20 read or Mr. Sirridge do you want to read it?
21 MR. COFER: Come on down.
22 MR. THOMAS: Give me a cite.
23 THE COURT: 85, Line 15. You might want
24 to back up actually. Start with Line 7.
25 Mr. Sirridge, you will be reading both

1 question and answers.
2 MR. SIRRIDGE: All right.
3 THE COURT: Thank you.
4 Go back a few lines before the siren

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5 started, which was just before you talked about
6 the book.
7 MR. SIRRIDGE: All right.
8 * * *
9 DR. SAMUEL HAMMAR, M.D.
10 was thereupon called as a rebuttal witness on
11 behalf of the Plaintiff and, having been previously
12 duly sworn, was examined and testified via
13 videotaped proceedings, which were read by counsel,
14 as follows:
15
16 CROSS-EXAMINATION
17
18 BY MR. SIRRIDGE:
19 Q. Doctor, isn't it true that there's a
20 problem with the lower trachea -- with cancers in
21 the lower trachea when it comes to the ability to
22 diagnose them through radiology?
23 A. I really don't know. I don't know enough
24 about radiology to say that one way or the other.
25 Q. Well, your book discusses that point,

1 doesn't it?
2 A. In what way? I don't know what you are
3 talking about.
4 Q. You have got your book up there?
5 A. I do, uh-huh.
6 Q. Why don't you -- why don't I refer you to
7 a page?
8 A. Okay.
9 BY MR. SIRRIDGE:
10 Q. Dr. Hammar, let me refer you to Page
11 1280.
12 A. Okay.
13 MR. SIRRIDGE: Should I read objections,
14 too?
15 THE COURT: Not necessarily. Just
16 proceed.
17 BY MR. SIRRIDGE:
18 Q. Well, just let me ask you Doctor, do you
19 know whether tumors of the trachea can be difficult
20 to diagnose because they are poorly seen in
21 radiology?
22 A. Well, I guess it depends on how you mean
23 diagnosed. I think it would probably be difficult
24 radiologically make any specific histologic
25 diagnosis of any type of cancer, but I would say I

1 don't know enough about radiology with respect to
2 how easy it is to image the trachea and to prove
3 that there's a mass there.
4 I think that would kind of depend on how
5 big the mass was and what the extent of the mass
6 was. I really don't know. I would defer that to a
7 radiologist.
8 Q. Well, Doctor, on Page 1280 there, it
9 indicates there were tumors of the trachea are
10 infrequent. Do you see that left-hand column
11 there?
12 A. Yes, I do see that, yes.
13 Q. They may escape detection for some time,
14 and it is estimated that 50 to 75 percent occlusion
15 is necessary before symptoms become so prominent

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16 that attention is drawn to this region?
17 A. Yes.
18 Q. Actually, the quote had nothing to do
19 with radiology. It was talking about 50 to 75
20 percent occlusion.
21 MR. GAYLORD: And detection by radiology.
22 MR. SIRRIDGE: Well, it's in Dr. Hammar's
23 book.
24 THE WITNESS: Well, I think it is true or
25 that is true. I mean, it's also true for

1 squamous carcinomas, is that, you know, it takes
2 a certain amount of tumor to actually be present
3 before any type of cancer causes symptoms. And
4 that is true of almost any type of cancer, be it
5 a skin cancer on your head, a tumor inside your
6 mouth, or a tumor in your vocal chords. I mean,
7 I think it's always that they have to reach a
8 certain critical size until they start either
9 irritating something, they cause pain or they
10 cause physiologic dysfunction.
11 BY MR. SIRRIDGE:
12 Q. Well, Doctor, let me go about two-thirds
13 of the way down the paragraph.
14 A. Sure. Uh-huh.
15 Q. It's hard to tell what line it is but it
16 begins, quote, "surface ulceration in any location
17 may result in hemoptysis.
18 A. That is true. I don't see that, but that
19 is true.
20 Q. Okay. "Tracheal tumors are only evident
21 in some 25 percent to 52 percent of routine chest
22 radiographs"?
23 THE WITNESS: I do see that, yes. That
24 is not -- that doesn't surprise me. I think
25 again it depends on how big they get and how many

1 symptoms they cause.
2 BY MR. SIRRIDGE:
3 Q. And you would agree with the following:
4 The lateral view is the best for seeing the trachea
5 because it clears the spine and other mediastinal
6 structures?
7 A. You know, I don't have enough experience
8 to know that one way or the other.
9 Q. You are aware that Mr. Williams had
10 hemoptysis at several points from 1991 to 1996?
11 A. The only records that I saw where he had
12 hemoptysis was in 1991 where he was described as
13 having reddish or blood-tinged phlegm. And then
14 the next time he had hemoptysis was in 1996. I
15 didn't see any times in the record that I had in
16 there where he had hemoptysis.
17 There were several mentioned, maybe
18 chronic bronchitis and symptoms referred to or
19 related with that such as cough and excess sputum
20 production, but I don't see hemoptysis.
21 Q. But he did have hemoptysis in October of
22 1991, didn't he?
23 A. He, did yes.
24 Q. And were you aware that Mrs. Williams
25 testified in the trial that Mr. Williams stopped

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1 going to Dr. Kern in 1991 for a period of time?
2 A. I didn't know that.
3 Q. So, it's hard to report symptoms when you
4 don't go to the doctor, isn't that true?
5 A. You know, it is, obviously. But usually
6 if somebody has hemoptysis that is usually such a
7 significant symptom that that usually frightens
8 people, at least in my experience. Reading medical
9 records, that would be something that would usually
10 bring most people to doctors.
11 Q. Doctor, isn't it true that both
12 mucoepidermoid carcinoma of the trachea and
13 mucoepidermoid carcinoma of the bronchus are
14 unrelated to cigarette smoking?
15 A. I don't know the answer to that. I would
16 say that the well-differentiated mucoepidermoid
17 carcinomas that occur in the trachea and bronchus
18 are generally not thought to be related to
19 cigarette smoking.
20 What I don't know would be exactly, if
21 you were to do a study of the individuals who had
22 those tumor, what percent would be cigarette
23 smokers. I know that in one series that I had a
24 paper on that I think up to 40 percent of them were
25 cigarette smokers.

28

1 Q. Doctor, can I refer you to Page 1281?
2 A. Sure.
3 Q. The middle of that page in the left-hand
4 column there's a paragraph starting with, quote,
5 "Carcinoid tumors," unquote.
6 A. Okay.
7 Q. And about half way down in that paper it
8 states, quote, "Mucoepidermoid tumors also occur in
9 the trachea but much less frequently than is seen
10 in the bronchi."
11 A. Yes.
12 Q. "As tobacco and other erogenous
13 pollutants are not thought to be important in this
14 tumor and because bronchial glands are abundant in
15 the trachea and bronchi, the reason for this is
16 unclear." Would you agree with that?
17 A. I see the that statement, yes.
18 Q. Would you agree with it?
19 A. I don't have any reason to disagree with
20 that. That is written not by myself but by Dr.
21 Dail. I think in every instance you have to look
22 at, you know, what percentage of the tumors are --
23 occur in people or cigarette smokers.
24 Carcinoid tumors, for example, occur in
25 about 50 percent of people that are non-smokers and

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1 50 percent that are smokers. And it's very
2 difficult to make an absolute decision whether the
3 tumor is smoking related or not smoking related.
4 I think all you can say is that a
5 significant number of those bronchial gland tumors
6 do not occur in people that are smokers.
7 Q. Doctor, you indicated that the pathology
8 sample, the biopsy, was approximately .5
9 centimeters.
10 A. Yes, five millimeters, sir. Yes, yes,
11 sir.

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12 Q. There was no operation to the whole tumor
13 could never be examined; is that true?
14 A. No, there wasn't. He was already a
15 stage -- actually, a stage 3B tumor because the
16 tumor had into his subcarinal lymph node into his
17 azygos lymph node and also grew into the trachea,
18 which made it a T4 lesion.
19 Q. The tumor was diagnosed too late for
20 surgery; correct?
21 A. Well, you could always do surgery, but he
22 was diagnosed too late that surgery would not be
23 indicated.
24 Q. There was no autopsy in the case;
25 correct?

1 A. That is correct, yes.
2 Q. An autopsy would have provided more
3 tissue for histologic or cell type analysis; isn't
4 that true?
5 A. That is true.
6 Q. And it would have provided more
7 information regarding the extent of the cancer
8 spread or metastases; true?
9 A. Yes. Autopsies always do that. I think
10 in this case, with respect to the spread and
11 extent, we have a pretty good idea. We don't know.
12 At least from all of the studies that I saw there
13 was ever a positive bone scan with respect to
14 metastases to his bone. There was never a positive
15 liver scan, spleen scan, adrenal metastases, and no
16 evidence of brain metastases. So, as best as we
17 could tell, based on the clinical studies, the
18 tumor was confined to the chest.
19 But autopsy sometimes can show things
20 that you don't see radiographically.
21 Q. And Doctor, do you see the medical record
22 that indicated that in the doctor's office that
23 someone wanted an autopsy in this case?
24 A. I did not see that, no.
25 Q. And did you review the medical records,

1 Doctor?
2 A. I reviewed what I was sent, yes.
3 Q. Did you see this medical record from the
4 treating oncologist? It indicates that on 3/17/97
5 patient expired, hemoptysis, wants autopsy. Did
6 you see that record?
7 The phone slip there, Doctor, I'm sorry,
8 I forgot to call your attention to it, the last
9 item.
10 A. I -- I don't know if I saw this or not.
11 I may have. I know I did see a record that stated
12 that he did on May -- I mean, on March 17th. I
13 don't recall seeing that phone note.
14 Q. Doctor, you see cases where autopsies
15 have been done all of the time in your asbestos
16 cases, don't you?
17 A. They are not always done. That is
18 answer. They are not always done in asbestos
19 cases, but I usually -- I do see case where
20 autopsies are done. And I do some myself.
21 Q. And as you indicated earlier, you did an
22 autopsy in that tobacco lawsuit down in

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23 Mississippi?
24 A. I did, yes.
25 Q. Okay. And that was at the invitation of

1 the plaintiff's lawyer in the case to come down and
2 do the autopsy?
3 A. That is correct, yes.
4 Q. And you did the autopsy several days
5 after Mr. Butler died?
6 A. Yes. It was a few days after he died. I
7 can't remember the exact number.
8 Q. And lung cancer had already been
9 diagnosed in that case; correct?
10 A. Correct. Yes.
11 Q. And it had been diagnosed at the
12 prestigious Oxner Clinic in New Orleans, hadn't it?
13 A. That's correct, yes.
14 Q. And you found lung cancer in the autopsy
15 but you diagnosed a different cell type that had
16 been diagnosed at the Oxner Clinic; isn't that
17 true?
18 A. That is true.
19 Q. And, in fact, you diagnosed adenosquamous
20 carcinoma, didn't you?
21 A. I did, yes, sir.
22 Q. And your book indicates that
23 adenosquamous carcinoma is both peripheral and has
24 early metastases; correct?
25 A. That's correct, yes.

1 Q. And that adenosquamous carcinoma in the
2 Butler case was located in the periphery, wasn't
3 it?
4 A. It was. It was located in between the
5 fissure of the left upper lobe and the left lower
6 lobe, and I think the reason that the doctors at
7 the Oxner Clinic didn't diagnose that was because
8 they just had a transbronchial biopsy to look at,
9 and I had the entire tumor, and that is obviously
10 the difference.
11 Q. And it was in the periphery, wasn't it?
12 A. It was, yes. It was right in between the
13 fissure between the left upper and left lower lobe.
14 Q. And there were also extensive metastases
15 in that case, too?
16 A. There were. There were metastases to the
17 brain, the bone. I can't remember if there were to
18 the liver or not, but there were several
19 metastases, yes.
20 Q. And in the case of Mr. Williams the
21 cancer had never spread outside the chest; isn't
22 that true?
23 A. Yeah, that is exactly right, and that is
24 exactly what you would expect in a squamous cell
25 carcinoma. They usually grow locally and spread in

1 the surrounding tissue.
2 MR. SIRRIDGE: Could you stop just a
3 second, and I'll take a quick peak here. I'm
4 probably done.
5 BY MR. SIRRIDGE:
6 Q. Dr. Hammar, just a couple more questions.
7 You noticed the presence of vacuolated

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8 cells when you were reviewing pathology of the
9 tumor?
10 A. I did, yes.
11 Q. Doctor, if you did a mucin stain on this
12 particular slide, wouldn't those vacuolated cells
13 show mucin?
14 A. Not necessarily.
15 Q. But they could show mucin; correct?
16 A. They could. It depends. I think the
17 majority of squamous cells when they become
18 vacuolated represent glycogen, which is not the
19 same as mucin. Glycogen is a complex carbohydrate.
20 Mucin is a glycoprotein.
21 If you did a mucin stain on there, it's
22 possible that some of those cells may have
23 sustained positive with mucin.
24 My guess would be that most of the
25 vacuolated cells would be glycogen.

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1 Q. And mucin is the type of a thing that is
2 produced by the mucous cells which are those cells
3 which turn into adenosquamous carcinoma; isn't that
4 true?
5 A. Yeah, that is true yeah.
6 Q. Doctor, when you get cases sent to you as
7 a consultant pathologist -- other -- I'm speaking
8 of other referred cases for your to review in your
9 laboratory --
10 MR. THOMAS: It says referred slides,
11 line 25.
12 MR. SIRRIDGE: Let me start again.
13 BY MR. SIRRIDGE:
14 Q. Doctor, when you get cases sent to you as
15 a consultant pathologist -- other -- I'm speaking
16 of other referred slides for you to review in your
17 laboratory, not necessarily legal cases.
18 A. Okay.
19 Q. What percentage of those are accompanied
20 by a full set of medical records?
21 A. Very few of them. It's not infrequent
22 for me to get summaries of medical records. I get
23 quite a few cases from here in Oregon, for example,
24 where one of the pulmonologists, for example, in
25 Eugene would usually send me a copy of her medical

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1 records, and I usually get information that is
2 written to me by the pathologist, what the clinical
3 situation is, but it would be uncommon for me to
4 get a full set of medical records.
5 Q. And certainly there are times when you
6 just get the pathology slides and perhaps the
7 pathology report; isn't that true?
8 A. That is true, yes.
9 Q. And, Doctor, finally, you can have cases
10 of high grade mucoepidermoid carcinoma where there
11 are no obvious glands present; isn't that correct?
12 A. I guess you could have that. I mean, at
13 least, theoretically. You could have that. I
14 don't know how you would diagnose it as such.
15 Q. Well, have you ever reviewed something
16 called the Atlas of Tumor Pathology, Tumors of the
17 Lower Respiratory Tract by Drs. Colby, Koss and
18 Travis?

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19 A. I have, yes.
20 Q. You know those gentlemen well, don't you?
21 A. I do, yes.
22 Q. This is considered an authoritative work
23 in the field of lung cancer; isn't it?
24 A. It is, yes.
25 Q. And you have a copy and refer to it and

1 rely on it from time to time, don't you?
2 A. I do.
3 Q. And, Doctor, there's a picture here in
4 the chapter on salivary-type gland tumors which
5 includes mucoepidermoid carcinoma; correct?
6 A. I'm sure there is.
7 Q. And I would point your attention to
8 figure 6-13, mucoepidermoid high grade there, 6-13.
9 There are no glands present in that
10 picture of a mucoepidermoid high grade; isn't that
11 true?
12 A. Well, there's not any glands, but I think
13 if you read the legend to that, and the legend
14 says, that there are solid sheets and nests of
15 intermediate and squamous cells without keratin
16 pearl formation, with intermixed mucin secreting
17 cells are present.
18 Glands will be conspicuously absent, but
19 there are mucus-secreting cells that are present,
20 which is certainly different than we see in this
21 tumor, I think.
22 Q. Is it your testimony that there are no
23 intermediate cells present in Mr. Williams' cancer?
24 A. I didn't say that at all.
25 I said that there -- in this picture,

1 what the legend says, that there are intermediate
2 and squamous cells without keratin pearls, and
3 intermixed mucin-secreting cells. There are
4 intermediate cells in his tumor, sure.
5 Q. And squamoid cells; correct?
6 A. And squamoid cells.
7 In fact, I think the majority of them
8 look squamoid based on that -- what I showed of the
9 intercellular junctions that connect the cells to
10 one another.
11 Q. And there were areas where you thought
12 you saw tiny glands attempted to be formed; true?
13 A. Yeah, there were. And what I said about
14 that is that if you go back and look at how
15 squamous cells carcinoma are formed, that is easily
16 explained.
17 MR. SIRRIDGE: Doctor, thank you very
18 much.
19 THE WITNESS: Thank you.
20 MR. SIRRIDGE: Redirect.
21 THE COURT: Mr. Thomas.
22
23
24
25

1 REDIRECT EXAMINATION
2
3 MR. THOMAS: By Mr. Gaylord:

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4 Q. Doctor, can you do an autopsy after the
5 patient is cremated?
6 A. No, that would not be possible. I mean,
7 you could get their bones, I guess, and maybe try
8 to extract some DNA and do some things like that,
9 but you could not look at any of their tissue.
10 Q. I don't know if anybody has talked to you
11 about this. Are you aware of Dr. Segal's testimony
12 about coming back from a vacation too late to set
13 up an autopsy before Jesse Williams was cremated?
14 THE WITNESS: I'm not aware of that, no.
15 BY MR. GAYLORD:
16 Q. Is cytology -- that is to say, the
17 brushings and looking at them under the
18 microscope -- an important and useful part of the
19 diagnosis of a cancer of this sort?
20 A. Yes.
21 Q. Is it possible for the biopsy pathology
22 to be a close call and for the cytology evidence to
23 make the difference in the diagnosis?
24 A. Sure.
25 Q. And do you have an opinion whether the

1 evidence of keratinizing squamous cells in the
2 cytology of Jesse Williams' case is a significant
3 and relevant finding for the proper diagnosis of
4 his lung cancer?
5 A. I do.
6 Q. And what is your opinion?
7 A. That it is.
8 MR. GAYLORD: Thank you, Doctor.
9 THE WITNESS: Thank you.
10 THE COURT: Jurors, that concludes the
11 testimony of Dr. Hammar. I need to take some
12 matters up with counsel outside your presence
13 before they can formally rest their cases. So
14 I'm going to excuse you now while I hope to be
15 able to take up again at 1:00 o'clock.
16 This technical problem has pushed us back
17 a little. So, let me ask you to be ready at
18 1:15, and be patient with us if we don't bring
19 you right in at 1:15. It's that I'm still
20 working with counsel.
21 But when you do come back we'll be ready
22 to get ready for closing argument.
23 Leave your notes, please, on the chairs.
24 Remember not to discuss the case. Watch your
25 step coming on out.

1 Mr. Rice is on his way to let you in.
2 And we'll try to be ready for you by 1:15.
3 * * *
4 (Whereupon, after the jury exited the courtroom,
5 the proceedings continued, as follows:)
6 * * *
7 THE COURT: All right. I want to move as
8 efficiently as possible through several issues.
9 First, with respect to the exhibits, are
10 there any matters I need to resolve for the
11 record?
12 MR. THOMAS: May I step into chambers to
13 get Mr. Coon?
14 THE COURT: Yes.

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15 Mr. Beattie, do you have materials for us
16 to review?
17 MR. BEATTIE: Yes, I do.
18 THE COURT: Would you hand them up,
19 please?
20 We'll take up the verdict forms first
21 then.
22 Mr. Thomas, I'm going to proceed now, and
23 you'll have to handle it.
24 Starting first with the issue regarding
25 the form of verdict, yesterday afternoon we

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1 discussed whether in the form of the special
2 verdict form misrepresentation Question 1 should
3 be phrased to include a reference to the specific
4 representation.
5 You should have in front of you from
6 Mr -- if Mr. Beattie has given it to you, two
7 forms of special verdict on misrepresentation.
8 One of them, in Question 1, reads: Did
9 Defendant make false representations concerning
10 the causal link between smoking and cancer upon
11 which Jesse Williams relied? And, if so, were
12 such false representations and reliance a cause
13 of damage to Plaintiff as to cigarettes sold to
14 Jesse Williams on or after September 1, 1988?
15 The other form of Question 1 asks the
16 same question, omitting the language, quote,
17 "concerning the causal link between smoking and
18 cancer."
19 Is there an objection as to either form?
20 And, if so, state it, please, and let's proceed?
21 MR. COON: We object to the longer for
22 Plaintiffs. Your Honor, we believe that the
23 specification of the specific kinds of
24 representations are taken care of in the
25 instructions.

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1 THE COURT: Do you see any error in
2 including it in Question 1?
3 MR. COON: I do not believe I could
4 assign legal error, but I object.
5 THE COURT: I'm going to include it, in
6 the absence of error. I think it's helpful.
7 It's just a summary, and so we'll work off of the
8 misrepresentation verdict form that has that
9 language, quote, "concerning the causal link,"
10 close quotes in Question 1.
11 I have then an original and copies of
12 both the misrepresentation and the negligence
13 special verdict forms.
14 And what I intend to do, when we get the
15 jury back in, is to give them some preliminary
16 instructions first about the requirement that 12
17 jurors deliberate, explaining to them what the
18 role of the alternates will be, explain to them
19 that we have two separate verdict forms on which
20 they will be deliberating and for which they must
21 make independent consideration of the evidence;
22 assure them that the Court has the responsibility
23 to enter judgment, based upon the verdict
24 information, and that in no event would any
25 double recovery type verdict form be entered; and

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1 explaining to them that at this point there are
2 two claims in the case, a claim for negligence
3 and a claim for misrepresentation; and that it
4 really isn't necessary for me to explain any more
5 than that.
6 I'm going to summarize from the Fourth
7 Amended Complaint the specifications of
8 negligence.
9 I'm going to tell the jury what the
10 alleged misrepresentation is.
11 I'm going to go through the
12 misrepresentation elements jury instruction so
13 that they understand all of the elements of
14 misrepresentation in a preliminary way.
15 And then I'm going to explain how it is
16 they proceed through these various verdicts
17 thereby covering an instruction on comparative
18 fault, the same nine, and so forth as to the
19 negligence verdict, and also addressing the
20 difference in burdens of proof between the two
21 verdicts, preponderance of the evidence on the
22 elements of negligence, clear and convincing
23 evidence on the issue of punitive damages, if
24 any, as to both verdict forms, and clear and
25 convincing evidence as to the elements of

1 misrepresentation.
2 And then I will pass -- I will in that
3 process have passed out to them copies of the
4 verdict forms that they can use for note taking
5 during arguments, and then we'll proceed with
6 arguments.
7 Regarding the punitive damage jury
8 instruction, Mr. Beattie has handed me one that
9 is called Plaintiff's Requested Instruction, and
10 it has Mr. Coon's name on it, and the other is
11 stamped original, and it's labeled Plaintiff's
12 Requested Jury Instructions, but I understand
13 it's really Mr. Beattie's Defendant's Requested
14 Jury Instructions.
15 MR. BEATTIE: That's right, Your Honor.
16 This instruction conforms to the suggestions you
17 made last night.
18 As far as I could tell, the only
19 difference between the two instructions is and
20 Mr. Coon's, and I don't have a copy handy -- now
21 I do.
22 In Mr. Coon's he uses the word assess
23 whereas I use the word award in the fourth
24 paragraph and the third paragraph.
25 I think the award language tracks the

1 punitive damages statute.
2 Also, they talk about the conduct causing
3 Jesse Williams' death, and my instruction talks
4 about the conduct causing Plaintiff's damage. I
5 really don't have a preference as to the language
6 in that respect. I think both convey the idea
7 that Defendant can only be punished for conduct.
8 That is the substance of the claims in this case.
9 THE COURT: Mr. Coon, do you agree that
10 that is a fair summary of what the differences

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11 are?
12 MR. COON: That is a fair summary, as far
13 as I can see, that's right, yes.
14 THE COURT: All right. We did the
15 assess-award analysis last Saturday when we
16 walked through the verdict forms. And when there
17 was a controversy raised among the lawyers about
18 what verb to use, I went back to the statute
19 which speaks in terms award. Award is on the
20 verdict form.
21 But Mr. Beattie, you, too, mixed those
22 verbs in your form, both assess and award.
23 MR. BEATTIE: That's been pointed out to
24 me.
25 THE COURT: It's not a material

1 difference. The statute speaks in terms of
2 award. So I'm just going to track the statute
3 throughout.
4 MR. BEATTIE: Thank you.
5 THE COURT: Point out the me the
6 causation language if it's different on the two.
7 MR. BEATTIE: In the second paragraph of
8 the form that I handed the Court says, the first
9 and second sentences, "In order for you to award
10 punitive damages against Defendant, Plaintiff
11 must show by clear and convincing evidence that
12 Defendant, engaging in the conduct, caused
13 Plaintiff's damages, has shown a reckless and
14 outrageous indifference," in the Plaintiff's
15 form.
16 THE COURT: I see it now.
17 MR. BEATTIE: The second paragraph, as
18 well.
19 THE COURT: Well, I would modify even
20 yours, Mr. Beattie, to say, in quotes, "In
21 engaging in conduct which was a cause of damage
22 to Plaintiff," again to be consistent.
23 Any objection there, Mr. Coon?
24 MR. COON: No objection, Your Honor.
25 THE COURT: Any other matter I need to

1 address on the form of the punitive damages
2 instruction?
3 MR. BEATTIE: Not from Defendant.
4 THE COURT: Mr. Coon?
5 MR. COON: Not from the Plaintiffs, Your
6 Honor, other than what was previously noted.
7 THE COURT: All right.
8 Last call on law and regulations, which
9 is to say judicial notice.
10 When we left discussion yesterday there
11 was a proposal by Mr. Randles that Plaintiffs
12 agree that there is evidence in the record as to
13 each of the three issues that were the subject of
14 the verdict or subject of the proposed
15 instruction, and that that would be satisfactory
16 to the defense, and then the Court would have to
17 instruct on it, and the parties could simply
18 argue about what the witnesses had said regarding
19 the FTC regulating the tar levels at various
20 points in time.
21 Where are we now on that point?

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22 MR. COON: There is evidence, I
23 understand, in the record, Your Honor. So, they
24 can do that.
25 THE COURT: Let me just speak to all of

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1 you, and please let's just have everybody track
2 right now.
3 What the defense wanted was me to
4 instruct the jury that in September of '55 the
5 FTC established cigarette advertising guidelines
6 that prohibited manufacturers from disclosing tar
7 and nicotine content in advertisements.
8 I concluded yesterday that was an
9 incomplete statement, and that if I'm going to
10 instruct on judicial notice we needed the other
11 part which was the scientific, if there was a
12 scientific basis part.
13 The next part on which there was a
14 requested instruction was that in March of '66
15 the FTC stated that cigarette advertisements
16 could contain factual statements concerning tar
17 and nicotine without violating the advertising
18 guidelines.
19 And third, that on January 1, '71, the
20 FTC made it unlawful to advertise cigarettes on
21 any medium of electronic communication subject to
22 the jurisdiction of the commission, including
23 radio and television.
24 We spent a lot of time yesterday
25 afternoon working through whether these were

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1 appropriate statements of the law, incomplete or
2 otherwise, whether they were over broad or under
3 broad. Lawyers for both sides were complaining
4 about the other's handling of the issue.
5 And where I left the proffered
6 instruction was that they were incomplete
7 statements.
8 I invited Mr. Randles to tender a more
9 complete statement. He then suggested that
10 Plaintiffs agree that there's enough evidence in
11 the record from which both sides can argue these
12 concepts so that we don't need to make it an
13 instruction and give it a judicial emphasis, but
14 that the parties can argue about what was or
15 wasn't what the witnesses said about the FTC
16 material, because there were questions posed to
17 witnesses on both sides, typically in
18 cross-examination, about that matter.
19 Final positions, please.
20 MR. GAYLORD: As the one who's going to
21 argue our side of this, to start with, Your
22 Honor, I would say I don't have a problem with
23 both sides arguing, but there's evidence of their
24 side about changes in the FTC rules as you
25 outlined, as long as we can also make the point

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1 that there was no restriction at any time about
2 them making a true statement about their
3 products.
4 I'm not sure what the advertising medium
5 cutoff in '71 has to do with it. I don't recall
6 specifically the evidence about that in this

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7 case. If it was, it was. I'm not sure where
8 there's an issue on that point. But I don't. It
9 doesn't matter to me.
10 THE COURT: Okay.
11 Who's speaking for the defense on that?
12 MR. RANDLES: Your Honor, essentially, I
13 don't have a problem with what Mr. Gaylord said.
14 THE COURT: Enough.
15 We are moving on. That is how we'll
16 handle Defendant's Number 18.
17 Okay. That takes us to an unnumbered
18 Defendant's instruction called Duty of Seller of
19 Dangerous Product, which is apparently based on
20 the restatement 388 and 389.
21 As I understand it, these are restatement
22 standards which apply outside the context of
23 product liability and create some statement about
24 the Defendant's potential duty.
25 My question to the defense, when we left

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1 this discussion, was whether any of the Oregon
2 cases cited at the bottom of the Defendant's
3 tendered instruction were cases other than
4 failure to warn cases?
5 Because if the instruction arises solely
6 in the context of failure to warn circumstances,
7 we don't have a failure to warn case, precisely
8 because failure to warn is preempted, and the
9 defense has made that point repeatedly.
10 So, let's start there, Mr. Beattie.
11 MR. BEATTIE: Restatement Section 388 and
12 389, as I said, are the negligence equivalent of
13 Comment k under Section 402A, which deals with
14 products that cannot be made safe.
15 The Restatement Sections 388 and 89
16 recognize that, with a properly manufactured and
17 designed product that is nonetheless dangerous,
18 the manufacturer's duty in that case is to warn
19 potential consumers of the inherent danger in
20 that product.
21 So, in cases such as tobacco, alcohol,
22 guns and other products that cannot be made safe,
23 the manufacturer's duty is to warn. And in that
24 case, the consumer has the opportunity to either
25 accept or reject the product. The consumer

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1 either doesn't buy alcohol, doesn't buy guns,
2 doesn't buy tobacco, or he or she does.
3 The analytical problem here is that this
4 usually arises in failure to warn cases because
5 the courts find in the first instance that the
6 manufacturer's duty is to warn. It can't change
7 the inherent nature of its product. So, being
8 that as it may, it must then warn.
9 So usually it's being faulted for its
10 failure to warn.
11 So, as a practical matter, yes, it comes
12 up in failure to warn cases, but all of those
13 cases are premised on the duty of a manufacturer
14 in the case of inherently unsafe products to
15 warn.
16 In Vitek, that was the case. Teflon
17 implant used for TMJ repair. Teflon is

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18 inherently dangerous. There are certain uses for
19 teflon that will no matter what cause injury,
20 even though teflon is a good well-manufactured
21 product. In that case the Court said the
22 Defendant's obligation is to warn.
23 McEwen vs. Ortho Pharmaceuticals. Even
24 though not addressed directly, the Court said the
25 same sort of thing. In the case of drugs, if you

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1 take too much of it, if you take too little of
2 it, a well-manufactured properly package and
3 designed drug can become dangerous. In that case
4 your duty is to warn.
5 Under Plaintiff's negligence claim, what
6 they are saying is that well-manufactured,
7 well-labeled, well-packaged and well-designed
8 cigarettes are nonetheless capable of causing
9 harm. No matter what care the Defendants in this
10 case exercised, its product would still be
11 dangerous.
12 They are suing in this case basically to
13 remove cigarettes from the market. They are
14 suing based on the fact that Defendant simply
15 sold a product that couldn't be made safe.
16 In that case, the Defendant's only duty
17 is to warn that this product has inherent
18 problems; it cannot be made safe. And once those
19 warnings are made, the consumer has the right to
20 either reject or accept the product.
21 Once the consumer is adequately informed,
22 it is then up to the consumer to decide whether
23 he or she will accept this properly-manufactured
24 product that is nonetheless capable of causing
25 harm. That is what 388 and 389 are all about.

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1 Now, in this case, in the context of a
2 preemption claim, if we have warned, and the
3 Court has held as a matter of fact, as a matter
4 of law that we have warned adequately, then there
5 can be no liability under 388 or 389 for selling
6 a product that cannot be made safe.
7 And I think that everybody would agree
8 that even well-manufactured cigarettes,
9 cigarettes that are properly designed and
10 packaged, have inherent health risks. And that
11 is exactly what at least two subparagraphs of
12 their negligence claim are suing on. They are
13 not suing on adulteration. They are not suing on
14 misrepresentations. They are suing on simply the
15 fact that properly-manufactured cigarettes were
16 sold.
17 And under these two restatement sections,
18 that is not enough to create liability, unless we
19 failed to tell the public that these cigarettes
20 were dangerous. And we did, as a matter of law,
21 that warning.
22 THE COURT: Mr. Coon.
23 MR. COON: Your Honor, I'm handing the
24 Court and I'm handing Mr. Beattie a copy of the
25 Restatement Section 388 and the preface to it

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1 which says that the peculiar rules applicable to
2 those who manufacture the chattel they up ply are

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3 stated in 394 and 398, and I have attached 397
4 and 398.
5 I think 398 is probably the most clearly
6 applicable. And it provides that a manufacturer
7 of a chattel made under a plan or design which
8 makes it dangerous for the use for which it's
9 manufactured is subject to liability to others
10 whom he should expect to use the chattel or to be
11 in danger by its probable use for physical harm
12 caused by its failure to exercise reasonable care
13 in the adoption of a safe plan or design.
14 And Comment b says that if there is
15 knowledge in the user of that then that maybe in
16 theory fault. I think that is the section that
17 leads into the jury instructions as they now sit.
18 This is a motion for directed verdict
19 apparently. And I don't think under this section
20 that it's well taken, and under any of these
21 Sections 388 just doesn't apply.
22 THE COURT: Well, to the extent it
23 applies, it applies in the context of the
24 exercise of reasonable care.
25 I believe the proper analysis is that, if

1 one focuses on the duty to warn and attacks a
2 manufacturer for failing to warn or failing to
3 adequately warn, this is the analysis that is
4 triggered here.
5 We don't have a warning case, as a matter
6 of law, because it's preempted.
7 Nor do I think that the tendered
8 instruction, which is unnumbered, you may want to
9 submit a number and something for the record, so
10 you have something in the file, because you have
11 written all over the one you gave me, I don't
12 think this tendered instruction is a proper
13 statement of Restatement 398. So, I decline to
14 give it.
15 Okay. What else do we have on
16 instructions?
17 MR. COON: Thank you, Your Honor.
18 MR. BEATTIE: I think that's it. There
19 was some discussion by the Court about whether
20 you wanted to regive the cautionary instructions.
21 THE COURT: Well, what I wanted both
22 sides to do was to be sure you have asked me to
23 give everything you want me to give, and I
24 suggest you might want to go through your
25 cautionary lists to be sure you hadn't left

1 something out. It was just a helpful tip.
2 Are there any more requested instructions
3 that either side want me to consider beyond what
4 we have already covered?
5 MR. COON: Not for Plaintiff, Your Honor.
6 MR. BEATTIE: Not for Defendant, Your
7 Honor.
8 THE COURT: Is there any objection then,
9 preceding Mr. Gaylord's opening argument, to my
10 summarizing the case in the manner in which I
11 outlined a little while ago; reading the
12 specifications of negligence; giving a general
13 statement about the law of negligence; ordinary

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14 care; reading the elements of the
15 misrepresentation claim, as we have worked them
16 out in the instructions; and the point of what
17 the misrepresentation claim is alleged to be; and
18 then making the jury aware up front about the
19 differences in burden of proof?
20 MR. COON: No objection to that
21 procedure, Your Honor, for Plaintiff.
22 MR. COFER: No objection, Your Honor.
23 THE COURT: All right.
24 Exhibits. Where are we on Exhibits?
25 MR. COON: We have done a run through of

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1 the lists, and I think we have agreement on the
2 lists. There are a couple of issues that we need
3 to do a hands-on review on, and we'll do that.
4 I'll go start doing it with them now.
5 THE COURT: Are there any issues on which
6 you need the Court's ruling as to exhibits?
7 MR. THOMAS: Yes.
8 THE COURT: Proceed.
9 MR. THOMAS: Bill, shall we go to 175?
10 I'll share with you -- I'm going to give to the
11 Court a copy of Plaintiff's Exhibit 175 and let
12 the Court know that the first page of this is the
13 cover page.
14 Do we have the original handy, from
15 Dr. May's?
16 What we have talked about is Dr. May's
17 reject or cold file, and of that file we have
18 selected the one, two, three, four, five, six,
19 seven articles from the Oregonian collection,
20 which are intended to supplement those articles
21 that he did submit as representative of Oregonian
22 articles for purposes of notice to the Plaintiff.
23 THE COURT: Okay. Stop there. Let me
24 hear first what the defense objection is, and
25 then you can tell me the purpose that you are

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1 seeking to accomplish?
2 MR. RANDLES: Your Honor, I object to the
3 last three articles. The first one is from the
4 Oregonian December 13th, 1981. The second one I
5 object to is the Oregonian Friday, December 20th,
6 1985. And the third one is from the Oregonian
7 June 26th, 1991. If I may, I have different
8 objections on the different ones.
9 First of all, the Oregonian December
10 13th, 1981. I object to this because it is
11 hearsay and hearsay within hearsay. This is not
12 consistent.
13 If I may, most of the articles offered in
14 this case have been offered simply for the fact
15 something was said either by the Tobacco Industry
16 or about the health risks of smoking, not the
17 truth of any studies reported on.
18 Is clearly offered for the truth that
19 internal medicine news and hearsay within hearsay
20 citing government findings, which, I guess, is a
21 third level of hearsay, says nearly one-third of
22 Americans is unaware of the danger of smoking
23 cigarettes.
24 THE COURT: Let me ask you this,

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25 Mr. Randles. Wasn't Dr. May the witness who

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1 talked about common knowledge?
2 MR. RANDLES: Yes.
3 THE COURT: Wasn't he the witness who
4 said -- gave opinions about what was the common
5 knowledge?
6 MR. RANDLES: Yes. As an expert, he did.
7 THE COURT: Your objection is overruled
8 to this page.
9 Your next objection?
10 MR. RANDLES: I had a second objection,
11 Your Honor.
12 THE COURT: I'm sorry.
13 Go ahead.
14 MR. RANDLES: My objection here also is
15 preemption. I mean, this is a clear statement,
16 "The public just doesn't know risks of smoking."
17 There's an adequate warning by the adequate
18 information after 1969. I don't believe they are
19 allowed to submit such a confusing document to
20 the jury saying yeah, but the information the
21 public has just isn't adequate.
22 THE COURT: The witness testified
23 presumably in support of the defense that
24 Mr. Williams should be charged with what the
25 witness described to be common knowledge about

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1 the risks of smoking.
2 What the witness used in terms of having
3 a basis to give the jury opinions about what
4 common knowledge was or wasn't is showable. And
5 for that purpose, the exhibit may be received.
6 MR. RANDLES: If I may, not everything he
7 reviewed becomes available as evidence to a jury.
8 It must be shown he reviewed and relied on
9 particular items.
10 THE COURT: And there is an issue of fact
11 regarding what he thought about these documents
12 and what he really meant in the note that is the
13 face sheet. The objection is overruled as to the
14 December 13, 1981 article.
15 Proceed, please.
16 MR. RANDLES: Your Honor, I object to the
17 next article as completely irrelevant to the
18 issues in the case. This is a review of whether
19 smokers cost their employers money. It is
20 relevant to an EG case or a union case perhaps.
21 THE COURT: What's the purpose for which
22 this is offered?
23 MR. THOMAS: May I see the article,
24 please?
25 This is the article that has -- and I

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1 have it highlighted on my copy, Judge. If you
2 look at mine, it will get you to the portion of
3 interest. Maybe more quickly -- ours.
4 THE COURT: Okay.
5 Quote, "Scott Stapf, S-t-a-p-f, of the
6 Tobacco Institute, labeled the report, quote, 'a
7 political rather than a scientific document,'
8 close quote, and suggested it was, quote,
9 'intended to shift the focus from workplace

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10 hazards to lifestyles; thus, raising questions
11 about the obligations of employers to maintain
12 clean work places,' end of quote.
13 "Koop saying that cigarette smoking
14 results in 340,000 premature deaths every year,
15 said the Tobacco Institute's continued
16 insistence, quote, 'that jury was still out,'
17 close quote, on smoking was the result of, quote,
18 'their lack of belief in science,'" end quote.
19 MR. THOMAS: This is intended to impeach
20 Dr. May's testimony regarding the decreasing
21 amount of presence in the media of the tobacco
22 industries and Tobacco Institute's views, and in
23 particular in this article a specific statement
24 on behalf of the Tobacco Institute making what in
25 the Plaintiff's view is a familiar refrain,

1 labeling new reports as political rather than
2 scientific.
3 THE COURT: In the context in which that
4 piece of information is presented, its
5 prejudicial impact outweighs any probative value.
6 It's collateral. We have got lots of evidence on
7 that point in the case. And that piece of the
8 article is very small, when compared to the rest
9 of the article on point.
10 So, the objection is sustained as to the
11 December 20, 1985 article.
12 Your last objection?
13 MR. THOMAS: Would the Court allow a
14 redacted version showing the date and --
15 THE COURT: It would be meaningless,
16 without reference to the actual underlying
17 report. The Tobacco Industry is responding to
18 the Surgeon General's report about workplace
19 matters.
20 The objection is strained.
21 Next.
22 MR. THOMAS: The next one is from the
23 Oregonian, June 26, 1991. Tobacco-Camp dissent
24 reported.
25 MR. RANDLES: Your Honor, this is hearsay

1 and hearsay within hearsay, and it's on a
2 completely collateral matter. What this article
3 is it's reporting on a study done by researcher
4 named Cummings where he sent out a survey to
5 scientists who had received grant money from the
6 Counsel for Tobacco Research and asked them what
7 they thought about the risks of smoking, whether
8 it had been proven, and that sort of thing.
9 An entirely collateral matter, a matter
10 never raised in plaintiff's case in chief. What
11 scientists, who did research with tobacco, with
12 CTR money, thought, and now this is being offered
13 for the truth of the matter asserted on a
14 peripheral matter. It doesn't matter what these
15 scientists thought. It was never an issue in the
16 case.
17 I also raise 403, that this Cummings
18 article was published. It's a very-well known
19 article. If Plaintiff's counsel wanted to raise
20 these issues in the case, it should have been

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21 raised in their case in chief.
22 This man has testified in other tobacco
23 cases, and then we would have had an opportunity
24 to rebut it.
25 As it stands now, it's a collateral

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1 matter with no opportunity for rebuttal, and it's
2 hearsay within hearsay.
3 THE COURT: The purpose for which it's
4 offered, Mr. Thomas?
5 MR. THOMAS: May I see it, please?
6 This cites a statement which is a recent
7 a 1991 statement by one of the witnesses who
8 testified via deposition in this case,
9 Mr. Merryman.
10 And you'll see that portion beginning
11 right here containing the Tobacco Institute's
12 position, and that is the Tobacco Institute has
13 long maintained that smoking is a risk factor
14 associated with a variety of diseases; however,
15 Merryman said we don't know whether smoking
16 causes disease, and it doesn't make a particle of
17 difference what the views of the council for
18 tobacco research grantees may be. We're
19 interested in the quality of the research, not
20 what their personal views are.
21 And the point of this is is that here we
22 were, continuing in 1991, to provide smokers,
23 such as Jesse Williams, with a crutch, in the
24 words of Mr. Merryman.
25 However --

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1 THE COURT: So the only purpose for which
2 you want this exhibit in are the two paragraphs
3 in the middle of the article that you're pointing
4 to? Statements of Mr. Merryman?
5 MR. THOMAS: Well, there's also a
6 statement by Harmon McAllister, who is not a
7 witness in this case, but was director of the
8 Tobacco Institute.
9 THE COURT: Well, here's the problem,
10 Mr. Thomas. Mr -- Dr. May testified about
11 common knowledge and the research on which he
12 relied in order to give the jury opinions about
13 common knowledge. That is why I overruled
14 Mr. Randles' objection as to the first three
15 documents.
16 But this has to do more with scientific
17 knowledge, No. 1, and that is not what the
18 witness testified about.
19 And, you know, at best, you have got an
20 argument that another witness Merryman, whose
21 testimony is before the jury, has made cumulative
22 statements here. We have got a ton of statements
23 in the record about what the Tobacco Industry's
24 position was, whether that is attributable to
25 Philip Morris. That is why I have allowed the

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1 misrepresentation case to go forward, because
2 there are a number of statements attributable to
3 the Defendant, depending upon how the jury views
4 the evidence concerning the causal link between
5 smoking and cancer.

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6 This article, as proposed, is not
7 admissible because it talks about scientific
8 results. The witness isn't here anymore to talk
9 about the extent to which he thought this related
10 to common knowledge. On its face, it doesn't.
11 So, it's not really admissible as to
12 Dr. May.
13 If you're talking about Merryman, and two
14 paragraphs here, it looks like a new exhibit to
15 me. A new document that wasn't marked regarding
16 Mr. or Dr. Merryman's, whatever his status is,
17 and his statements.
18 So, to me, it's just cumulative stuff.
19 You have got tons of this in the record already.
20 MR. THOMAS: This, Your Honor, is one of
21 the most recent statements that is demonstrating
22 their denial in the common acknowledge arena,
23 which is the Oregonian, something that Jesse
24 Williams read. And this is the sort of thing, as
25 you know from the testimony of Mayola Williams,

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1 that Jesse Williams fastened upon in terms of
2 providing her with reasons that it hasn't been
3 demonstrated that smoking causes cancer. And
4 this is -- the date of this is 1991, and --
5 THE COURT: Well, let me interrupt you to
6 ask this. What's the evidence in the record
7 about the latest time when these kinds of
8 statements could be attributed to the Defendant?
9 MR. RANDLES: Well, Your Honor, Merryman
10 himself, his testimony which is entirely
11 cumulative, this is entirely cumulative of was in
12 the Minnesota case which was in trial last year,
13 and so --
14 THE COURT: You are not answering my
15 question. What does the jury know about the
16 latest points in time that the Defendant or the
17 Tobacco Institute was taking this position? In
18 other words, is it already in the record that in
19 1991 Merryman or the Tobacco Institute were
20 making these kinds of statements that could be
21 attributed to the Defendant?
22 MR. RANDLES: Yes. I'm sorry. I thought
23 I was answering your question of when Merryman
24 testified in Minnesota he said that has been our
25 position and that is still our position. We are

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1 making these statements frequently. And he was
2 shown one document after another and the
3 testimony that was read of public statements
4 saying this.
5 THE COURT: Okay.
6 So, the most probative point that I'm
7 hearing Mr. Thomas point to is that this is a
8 statement that was in the Oregonian in 1991, the
9 two paragraphs in the middle column, attributable
10 to Mr. Merryman and to the Tobacco Institute.
11 Let me see a redacted version of that
12 exhibit; otherwise, the objection is sustained.
13 I'll take that up after the recess.
14 MR. THOMAS: Fair enough.
15 THE COURT: Okay.
16 What else do we have on exhibits?

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17 MR. THOMAS: Your Honor, there are three
18 cigarette packs that were identified by Mayola
19 Williams and produced which have not been marked
20 as cigarettes that were purchased for Jesse
21 Williams. Two are longs. One is mild. And one
22 is the red 100s. The other is the regular
23 length.
24 The Defendants have, from another one of
25 these that I got, one of the exemplar cigarettes,

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1 and I believe that the record is not going to be
2 clear in terms of the identification for these.
3 I don't think there's any dispute about
4 what she said in regard to which packs. These
5 are the ones, and I would represent that, to the
6 Court, the same ones. And we would seek to mark
7 these and make these exhibits.
8 THE COURT: Now is a little late for
9 marking them. Tell me what it is and when the
10 problem is.
11 Folks, we are burning valuable time here.
12 MR. THOMAS: Okay. Sounds like there's
13 no objection.
14 MR. RANDLES: No objection.
15 THE COURT: All I want to know is are
16 there exhibits that I have to rule on, please?
17 MR. THOMAS: May I have a moment?
18 The testimony of Dr. Burns was that there
19 were a number of statements of cancer which were
20 referred to in his testimony. These were
21 referred to by their trial exhibit numbers in the
22 record, and I would propose to remark them and
23 have them.
24 THE COURT: Were they marked as trial
25 exhibits as part of your exhibit list?

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1 MR. THOMAS: They were not marked as
2 trial exhibits as part of our exhibit list.
3 THE COURT: All right. They were shown
4 to the jury without being offered and without
5 there being any discussion at the time. You may
6 use them in closing arguments. They won't go to
7 the jury.
8 Next.
9 MR. THOMAS: Let's see. We have no
10 argument about the original face sheet from
11 Dr. May?
12 MR. RANDLES: I'll get it. I don't know
13 where it is. But we don't have a problem with
14 it. It's probably in my office.
15 MR. THOMAS: Okay.
16 May I have a moment, since this is sort
17 of final?
18 THE COURT: It is absolutely the final
19 point.
20 MR. GAYLORD: Your Honor, can I raise a
21 point about what I would like to do?
22 THE COURT: May I have someone paying
23 attention, please, from the defense so I can
24 proceed?
25 Go ahead.

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1 MR. GAYLORD: Thank you.

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2 You know, I should ask Mr. Cofer because
3 we had a talk about this, and I haven't heard his
4 answer yet.
5 MR. COFER: No objection.
6 MR. GAYLORD: No objection.
7 THE COURT: Thank you.
8 Anything else from the Plaintiff on
9 exhibits?
10 MR. COON: Just to make sure we all agree
11 on this, there are some exhibits that appear to
12 be demonstrative, but it's unclear whether they
13 have been admitted substantively or
14 demonstratively.
15 I'm prepared to assume now that they are
16 all demonstrative. Obviously, they all can be
17 used in closing argument. Whether they actually
18 go into the jury room is a question we still need
19 to answer, but I think we don't need to answer
20 that before the closings.
21 THE COURT: Well, except to the extent in
22 your closing arguments you are going to say
23 "you're going to have this in the jury room" or
24 not, or "look at this when you are back in the
25 jury room.,"

1 The rule is if the exhibit is received it
2 goes to the jury. If it was marked as a
3 demonstrative exhibit only, it does not. It may
4 be demonstrated, but it won't go to the jury.
5 MR. THOMAS: There were a number of
6 exhibits which were marked, and perhaps, quote,
7 "received," unquote, as demonstrative exhibits.
8 THE COURT: If they were only
9 demonstrative exhibits, they are only
10 demonstrative for argument and they do not go to
11 the jury.
12 If they were offered and received as
13 substantive evidence, they may go to the jury.
14 If there is a dispute, we'll go back to
15 the record, and I'll rule on it.
16 MR. RANDLES: There were three that were
17 admitted in the defense case that we moved and
18 were admitted. We have confirmed this with the
19 clerk. They were 923, 926 and 919. Otherwise,
20 we have no issues.
21 THE COURT: And the Plaintiff disputes
22 that, is that what you are telling me?
23 MR. GAYLORD: I'm not sure. I just want
24 to see which ones they are.
25 MR. THOMAS: Can we get a description of

1 which ones they are? A demonstration?
2 MR. GAYLORD: I think I remember
3 specifically saying if those are offered
4 demonstratively, I have no objection.
5 THE COURT: I don't want to rely or place
6 the responsibility on the clerk for this. So
7 let's go to the transcripts. Let's find out what
8 was said on the record. And we can get that
9 resolved.
10 What other Plaintiff's issues are there
11 on exhibits?
12 MR. COON: No other Plaintiff's issues,

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13 Your Honor.
14 THE COURT: What about Defendant's
15 issues?
16 MR. RANDLES: We have no other issues.
17 THE COURT: Okay.
18 So, we have got the exhibits done
19 provisionally. Mr. Thomas is going to show me a
20 new Plaintiff's 175 that omits the article of
21 December 20, 1985 and redacts most of the article
22 of June 26, '91. And until I rule that received,
23 those documents shouldn't be shown to the jury in
24 closing.
25 And then we need to know what was

1 actually said on the record about the proffer of
2 the three defense exhibits just referenced that
3 have some writing, I think, by Mr. Cofer during
4 examination.
5 As soon as we get that done, we can start
6 disassembling the room.
7 Mr. Tauman, here are your Wakeham Death
8 in the West stuff. I don't need them, and you
9 can have them.
10 MR. TAUMAN: Great.
11 THE COURT: All right.
12 Let's go back on the record.
13 While the issue regarding these three
14 defense exhibits is still being pursued,
15 Mr. Beattie, I understand or Mr. Dumas, somebody,
16 wanted to renew motions on behalf of the
17 Defendant.
18 Is that right?
19 MR. BEATTIE: That's right.
20 We reraise all of the motions that we
21 raised until chambers yesterday. And I
22 understand that the Court will be giving the same
23 rulings.
24 We also move for directed verdict on the
25 issue of causation because there is no evidence

1 in the record from which a reasonable juror could
2 find that Jesse Williams' cancer and death were
3 caused by smoking cigarettes.
4 And we move for a directed verdict on the
5 final basis that under Restatement Section of
6 Torts, 388 and 389, at least to the extent
7 Plaintiff is arguing that Defendant is liable in
8 negligence for merely selling well-manufactured
9 and prepared cigarettes, it's our motion that
10 claim be dismissed under the relevant restatement
11 sections.
12 THE COURT: Any response?
13 MR. COON: The same responses, Your
14 Honor. Thank you.
15 THE COURT: On the question of causation,
16 in the light most favorable to the Plaintiff, a
17 rational trier of fact could conclude that
18 Mr. Williams died because of a smoking-related
19 cancer for which smoking Marlboro cigarettes sold
20 to him, on or after March 1, 1981, was a
21 substantial factor.
22 With regard to all of the directed
23 verdict motions on liability, on punitive

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24 damages, and on all of the legal points
25 represented in the Defendant's requested

1 instructions and the written directed verdict
2 motions, I understand what's happening here is
3 that there was just an abundance of caution being
4 taken to make sure that no motion is being
5 waived, and I have given as thorough a
6 consideration as I could to all of the legal
7 grounds for these motions, with one exception,
8 and I'm about to reference, and all of the
9 rulings remain the same.
10 To the extent I can say the motion has
11 been timely made, I'm saying it. I have
12 considered it and considered it and considered
13 all of the grounds.
14 This business about Section 388 and 389
15 of the Restatement is new. It was not raised in
16 any of the pretrial motions in the trial
17 memoranda as a basis of Section 388 immunity
18 so-to-speak, that there is no basis in law that
19 you could go forward.
20 I have denied the motion for the reasons
21 I have indicated. To the extent this needs to be
22 examined more fully, I suspect I'll have an
23 opportunity post-verdict to do that.
24 But I'm simply noting for the record
25 that, while we have had a lot of opportunity to

1 consider legal grounds on a number of factors,
2 this one is relatively new, and it was only
3 yesterday afternoon that it was being asserted
4 that what Plaintiffs were pursuing was simply a
5 claim against the Defendant for selling, quote,
6 "well-manufactured cigarettes," for which the
7 Defendants sole duty was a duty to warn, which is
8 as a matter of law met by selling cigarettes that
9 have the Surgeon General's warning.
10 And I just want the record to be clear
11 that that -- that the significance of a
12 Restatement Section 388 argument has not really
13 been briefed or fully analyzed, and to the extent
14 there is more to the analysis, I'm sure, as I
15 say, we'll have an opportunity to consider that
16 in briefs in post-verdict motions.
17 Anything else, Mr. Beattie?
18 MR. BEATTIE: That's all I have.
19 THE COURT: Mr. Coon?
20 MR. COON: Not for Plaintiff. Thank you.
21 MR. DUMAS: For Defendant, Your Honor, I
22 do have four brief additional motions.
23 THE COURT: Proceed.
24 MR. DUMAS: Motions to strike or, in the
25 alternative, I believe more properly

1 characterized as a motion to withdraw.
2 If the Court might have its Fourth
3 Amended Complaint in front of it?
4 THE COURT: I do.
5 MR. DUMAS: I'll refer you first, the
6 first motion would be as to Paragraph 11.
7 THE COURT: Mr. Coon, I'm going to need
8 on you this, please.

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9 MR. DUMAS: Actually, the first motion is
10 as to the second claim for relief, negligence,
11 paragraph 11 B 3, that allegation claims that the
12 cigarettes were -- that the Defendant was
13 negligent for adding nicotine to its product.
14 I would submit, Your Honor, there has
15 been no or certainly no sufficient evidence that
16 any of Philip Morris' products sold after
17 September 1, 1988 contained additional or
18 additive --
19 THE COURT: I don't read in Paragraph 11
20 B 3 any allegation of alleged nicotine. What is
21 alleged is that the Defendant controlled and
22 manipulated the amount.
23 MR. DUMAS: I'll take that as a denial.
24 THE COURT: Well, I'm saying that I don't
25 see that the allegation stands for the

1 proposition you're asserting.
2 MR. DUMAS: Well, Your Honor, I guess
3 when they say amount of nicotine, I can't imagine
4 that there would be any claim that we have less
5 than the amount of nicotine.
6 THE COURT: No. The allegation is that
7 it was controlled and manipulated.
8 MR. DUMAS: Again --
9 THE COURT: There is evidence about
10 reconstituted leaf. There is evidence about the
11 manner in which the nicotine levels were
12 controlled and manipulated. It does not allege
13 adding. So, in that regard your motion doesn't
14 meet the allegation.
15 MR. DUMAS: Very well.
16 THE COURT: Proceed.
17 MR. DUMAS: The next motion would be as
18 to Paragraph 11 B 4 concerning adding sugars.
19 There is insufficient evidence in this record,
20 Your Honor, that the inclusion of sugars as part
21 of the manufacturing process in any way increased
22 the addictive nature of cigarettes or, more
23 importantly, any evidence that it was
24 unreasonable for a manufacturer to add sugar as
25 part of its flavor component. All of the

1 witnesses testified that sugar is routinely added
2 to cigarettes for a flavor component.
3 THE COURT: As I understand it,
4 Plaintiff's theory as to this specification, it
5 has to do with the chemistry of acetaldehydes and
6 the extent to which that chemistry increases the
7 impact or effect of nicotine.
8 In the light most favorable to the
9 Plaintiff, there is a factual basis to proceed on
10 that theory under 11 B 4.
11 Your motion is denied.
12 Next.
13 MR. DUMAS: The next motion, Your Honor,
14 is on Paragraph 11 A, dealing with advertising.
15 THE COURT: You know, excuse me,
16 Mr. Dumas, we did all of these in chambers
17 yesterday.
18 MR. DUMAS: Yeah. Those were directed
19 verdict motions, Your Honor.

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20 THE COURT: And I have considered them as
21 motions independently to strike. I have gone
22 through each of these allegations, I think, three
23 times now.
24 MR. DUMAS: If the Court independently
25 considered them as motions to withdraw, then I

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1 have nothing further.
2 THE COURT: Does the Plaintiff agree that
3 that is the status of the record?
4 MR. COON: That's right, Your Honor.
5 They can certainly be considered that way.
6 MR. DUMAS: That is fine.
7 THE COURT: Mr. Dumas, any other motions?
8 MR. DUMAS: No.
9 THE COURT: Mr. Cofer?
10 MR. COFER: They were demonstrative
11 exhibits. They were not offered for any other
12 reason. And we don't ask to send them back to
13 the jury.
14 THE COURT: All right. Thank you. That
15 resolves the issue on those three Defendant's
16 exhibits.
17 Now, do we have anything else for the
18 record before we turn this room into chaos?
19 MR. COON: Not for Plaintiffs, Your
20 Honor.
21 THE COURT: All right. We are off the
22 record and won't go back on the record until the
23 room is set up and we are ready to bring in the
24 jury.
25 * * *

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1 THE COURT: Are we ready to go on the
2 record?
3 MR. GAYLORD: Yes, Your Honor.
4 THE COURT: With respect to the
5 Plaintiff's exhibit that needs redacting over the
6 noon hour, Mr. Thomas?
7 MR. THOMAS: Yes. Thank you, Your Honor.
8 Plaintiff has redacted the June 26th,
9 1991 Oregonian article, Exhibit 175. And I have
10 shown it to defense counsel. They do not seek to
11 be heard upon the matter, and I'll show it to the
12 Court.
13 THE COURT: You confirm that the material
14 is just as we discussed before?
15 MR. RANDLES: Yes, Your Honor.
16 THE COURT: All right.
17 Does the defense still object?
18 MR. RANDLES: No, Your Honor.
19 THE COURT: All right.
20 So that makes that clear for the record.
21 The last document, Exhibit 175, is the redacted
22 version of the June 26, 1991 exhibit to which
23 there is no objection.
24 I understood from the clerk that with
25 respect to exhibits there was still some

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1 ambiguity about certain exhibits to which the
2 defense asserted authentication objection.
3 Where are we on that?
4 MR. RANDLES: My understanding is

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5 Mr. Coon was going to go back and review those
6 and review transcripts to see if indeed our
7 understanding of what was authenticated in
8 Dr. Pollay's testimony is accurate. And we
9 provided information on those that we thought was
10 authenticated.
11 THE COURT: Well, I just want to be sure
12 that we don't have a problem in the middle of
13 Mr. Gaylord's argument.
14 Are there any? Maybe the two of you, you
15 and Mr. Gaylord, can talk so that you know what
16 documents your concerns address, and then he can
17 tell me if their involvement is argumentative,
18 and we can resolve them, if we have to.
19 Is that all right with you?
20 Talk about it off the record.
21 MR. COFER: Your Honor, one more thing
22 with respect to exhibits. On the time line
23 there's a reference to Exhibit 70 which has been
24 excluded from evidence. I don't think there is
25 anything that needs to be done with the

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1 demonstrative. I just wanted to make a record on
2 that, and Mr. Gaylord is obviously not going to
3 use that exhibit.
4 THE COURT: Tell me again what Exhibit 70
5 was?
6 MR. COFER: I believe Exhibit 70 was a
7 Brown & Williamson document.
8 THE COURT: All right. That is not
9 received. And what's on the diagram?
10 MR. COFER: All it says is July 30th,
11 1969, Exhibit 70. It has an icon that says what
12 they knew about addiction. There's no text.
13 THE COURT: Can you post-it over that?
14 MR. GAYLORD: We could do that; although,
15 I have to say that might draw more attention to
16 it than doing nothing. I, frankly, am not going
17 to spend any time on this exhibit other than to
18 remind them that they have seen it before.
19 THE COURT: Is that all right with you?
20 MR. COFER: That is fine.
21 MR. GAYLORD: To the extent I'm going to
22 make reference to the exhibits, I have got a list
23 of them over here that I'm going to show.
24 THE COURT: And you're sure that list is
25 confirmed received?

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1 MR. GAYLORD: I am assured of that, and I
2 have to rely on what I have been assured. But
3 that one is not on there.
4 THE COURT: Folks, I'm really sorry how
5 warm it is in here. Those of you with jackets on
6 and lawyers, if you feel like you need to keep
7 your coats on because of the court rules, feel
8 free to take them off. It's very uncomfortable,
9 and it's just going to get warmer. So, feel free
10 to make yourselves comfortable. We have no
11 control over the temperature.
12 All right. Let me get confirmed for the
13 record, please, that the defense is satisfied
14 that the exhibits to which Mr. Gaylord makes
15 reference are received?

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16 MR. RANDLES: Your Honor, all of the
17 exhibits listed on his chart, which he tells me
18 are all exhibits that he plans to use in his
19 closing are received, except for Exhibit No. 2,
20 which has not been authenticated. And I
21 understand from Mr. Gaylord that will not be
22 used.
23 MR. GAYLORD: Yeah. And I have crossed
24 that one off here. I don't want to say that is
25 all of the exhibits that I'm using in closing.

1 That is all that I'll refer to in that respect.
2 If there are any others that I'll refer to, it
3 will be things on videotape that I intend to play
4 and the ones that have been discussed this
5 morning.
6 THE COURT: And with regard to the
7 authentication issues, beyond that, where are we?
8 MR. RANDLES: Well, there are other
9 exhibits that are on Plaintiff's list that have
10 not been authenticated. I have spoken to
11 Mr. Coon about that problem during the meeting
12 with the clerk. Our list, I passed our list to
13 Mr. Coon. Those have not been authenticated; I
14 believe the Court clerk's understanding, as well.
15 Mr. Coon is double checking that.
16 THE COURT: All right. I'm just going to
17 leave the record then in this position. Those
18 exhibits that are not received, to the extent the
19 Plaintiff wants to make reference to them or
20 clarify that they are received, I'll just wait
21 for you to bring that up. But we have got to
22 have a bright line now that we are starting.
23 MR. GAYLORD: And what you just said was
24 about any of those that there are questions about
25 authenticity?

1 THE COURT: Yes. The exhibits
2 Mr. Randles has been concerned about as not
3 having yet been authenticated over which there
4 seems to be some controversy, but it also appears
5 you are not planning to use them.
6 MR. GAYLORD: I don't believe there are
7 any that I'm going to use.
8 THE COURT: For the record right now,
9 those are not received. The clerk is noting them
10 as not received. It's up to Plaintiff to bring
11 it back to me on the record if they are going to
12 be received before they go to the jury.
13 MR. RANDLES: One other matter, Your
14 Honor. Many of the exhibits on that list were
15 ordered redacted by the Court. I have not
16 reviewed Plaintiff's counsel's copy. I assume
17 they comply with the Court's requirements.
18 MR. GAYLORD: At least underway. I'm not
19 going to use it or raise any questions about
20 that.
21 THE COURT: All right.
22 MR. GAYLORD: If I'm doing anything with
23 them, I'm just going to show what's been shown as
24 highlighted material.
25 THE COURT: Is there anything else for

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1 the record before we bring in the jury?
2 Okay. You'll need to have a seat because
3 I do need to talk with the jury for just a few
4 minutes.
5 Bring them in, please.
6 Folks, once we get started, I ask that
7 nobody leave unless there's an obvious break in
8 the proceedings so that the jury is not
9 distracted from counsel's argument and that
10 counsel is not distracted either.
11 * * *
12 (Whereupon, the proceedings continued, in the
13 presence of the jury, as follows:)
14 * * *
15 THE COURT: All right.
16 Good afternoon, jurors.
17 JURORS: Good afternoon.
18 THE COURT: We have rearranged things
19 because now we are not any longer concerned with
20 the view of the witness stand. The parties have
21 formally rested. And I'm about to give some
22 preliminary instructions before Mr. Gaylord
23 proceeds to the Plaintiff's opening argument.
24 First of all, under Oregon law, indeed
25 under the Constitution of the State of Oregon, a

1 jury in a circuit Court case is comprised of 12
2 jurors.
3 Our four jurors here on my right, on the
4 left of the panel, are alternate jurors. And,
5 folks, unless something unusual happens, you will
6 not be deliberating on this case. The law
7 requires that the 12 jurors deliberate.
8 However, it is important that you
9 participate in the instructions and that you are
10 here for argument, because, in the unlikely event
11 that a juror became disabled during the
12 deliberations, it would be necessary to seat an
13 alternate and to have those deliberations begin
14 anew, and so you would have to be obviously still
15 on board here. So I wanted to let you know what
16 your function was.
17 With respect to the 12 deliberating
18 jurors, Oregon law requires that three-fourths of
19 you agree in order to return a verdict.
20 I'm about to pass out to you your work
21 copies of the verdict forms on which you are
22 going to be deliberating.
23 There are two claims in the case which
24 you are being asked to decide. One is a claim of
25 negligence, and one is a claim of

1 misrepresentation. And I'm going to through
2 those verdict forms with you in just a minute,
3 but I want to make one point as clearly as I can
4 about the three-fourths agreement issue.
5 Of 12 jurors, three-fourths is nine.
6 Nine of you must agree in order to return a
7 verdict. You will see that these verdict forms
8 are set up in the form of questions.
9 And it is possible that you may be
10 answering more than one question on any
11 particular verdict form.

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12 Each claim, the negligence claim and the
13 misrepresentation claim, needs to be deliberated
14 upon separately. They are separate intact
15 individual claims. And one does not depend upon
16 the other.
17 So, theoretically, one set of nine of you
18 could agree on a verdict on one claim, the
19 negligence claim, for example, and a different
20 combination of nine of you could agree on a
21 verdict on the other claim, because they are not
22 related. Understand?
23 To the extent your deliberations take you
24 past one question, the same nine of you who agree
25 on the answer to the first question must agree on

1 all other questions that are answered on that
2 verdict form, because the same nine of you have
3 to be able to return the verdict and, if the
4 verdict is more than one question, the same nine
5 of you must be in accord on all of the questions
6 that you answer on that form.
7 So, as you deliberate it will be
8 necessary for you to keep track, if you will, of
9 that core group of nine.
10 Now, two other points in that regard. If
11 there are nine and no more who agree on any
12 particular question, that does not disqualify the
13 other jurors from deliberating. All jurors
14 deliberate on all questions.
15 But for you to tell me when you return
16 the verdict that it is a valid verdict, you need
17 to be able to assure me that the same nine people
18 agreed at least on the questions that you do
19 answer within one particular verdict form.
20 Secondly, you are going to note that each
21 verdict form has a question regarding damages.
22 And I want to assure you that it's my job, after
23 you return a verdict, to enter judgments based
24 upon the verdicts you enter.
25 In the event you do find Defendant liable

1 on both the negligence and the misrepresentation
2 claims, and you award damages on both the
3 negligence and the misrepresentation claims, I
4 want to assure you that there will not be a
5 double award, because it's my job to reconcile
6 those and enter but one judgment based upon the
7 law thereafter.
8 So, don't be concerned if you do get to
9 the question of damages that you need to adjust
10 one way or the other, because there are two
11 separate verdicts. They just need to be
12 considered by you independently.
13 Okay. So far so good? All right.
14 I'm going to pass out verdict forms. You
15 need to take one. Well, Mr. Rice will pass them
16 out.
17 We have got one form called negligence
18 and one form called misrepresentation. And
19 you'll see that label over on the right-hand side
20 of the document under the caption Special Verdict
21 Form. Be sure that you have both negligence and
22 a misrepresentation form. And then when those

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23 are passed out, I'll start with the negligence
24 claim.
25 THE CLERK: Just take one and pass it

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1 down, really fast. There, folks. Thanks.
2 Somebody has got two misrepresentation
3 forms. Somebody has two. There you go. There
4 should be one more. Somebody has two. Thank
5 you. Great. Thanks, folks.
6 THE COURT: All right.
7 Jurors, at the beginning of the case when
8 we were upstairs and we were first getting to
9 know you and explaining what it was you were
10 about to undertake, I gave you some general
11 statements about the nature of the case. Those
12 were based upon what I knew at the time, based
13 upon the pleadings were in the case.
14 Essentially, you should disregard any
15 notes you have about that because what I'm
16 telling you now is what counts in terms of your
17 deliberations and in summarizing what the claims
18 are on which you'll be deliberating.
19 As I said before, there are two claims
20 that are being put forward to you. One is a
21 claim for common law negligence, and the other is
22 a claim for misrepresentation.
23 With regard to both of those claims,
24 Oregon law provides that product damages claims
25 must be commenced not later than eight years

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1 after the date on which the product was sold.
2 Therefore, in this case, ultimately, the
3 Plaintiff may recover only if cigarettes sold to
4 Jesse Williams on or after September 1, 1988 were
5 a substantial factor in the cause of Plaintiff's
6 damages, as alleged in this case.
7 Now, that date is going to be argued to
8 you by counsel. It appears in the verdict form.
9 And that is why I'm starting at that point.
10 I also want to assure you that at the end
11 of all of the arguments I'll be repeating these
12 rules and giving you a comprehensive set of
13 instructions, which the court reporter will
14 transcribe and which you'll have available to
15 you, if you need them during your deliberations.
16 So, look with me now, please, at the
17 negligence verdict form. You will see that the
18 format is, as I indicated, specific questions to
19 you.
20 The first question on that form reads:
21 Was the Defendant negligent, as claimed in
22 Plaintiff's Complaint, and, if so, was such
23 negligence a cause of Plaintiff's damages as to
24 cigarettes sold to Jesse Williams on or after
25 September 1, 1988?

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1 Jurors, in general, the law assumes that
2 all persons have obeyed the law and have been
3 free from negligence.
4 So, you start from an assumption that, in
5 order to prove negligence, there has to be some
6 evidence that is brought forward.
7 In general, it's the duty of every person

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8 in our society, and by person I mean both
9 individuals and corporate persons, it is duty of
10 every person in our society to use reasonable
11 care to avoid jury to one's self or another.
12 Common law negligence then is doing
13 something that a reasonably careful person would
14 not do or failing to do something that a
15 reasonably careful person would do in the same or
16 similar circumstances.
17 Now, that is a very shorthand definition
18 of negligence. I'll give you the more
19 comprehensive one at the end of the case.
20 But to deliberate on Question 1, you are
21 going to need to decide was the Defendant Philip
22 Morris negligent? Did Philip Morris act in a way
23 that a reasonably careful cigarette manufacturer
24 would not act? Or did Philip Morris fail to act
25 in a way that a reasonably careful cigarette

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1 manufacturer would have acted in the same or
2 similar circumstances, which was a cause of
3 damage to the Plaintiff as to cigarettes sold to
4 Mr. Williams on or after September 1, 1988?
5 In this regard, the Plaintiff makes
6 certain allegations of negligence. And you'll
7 see that in Question 1 you are asked: Was the
8 Defendant negligent as claimed in Plaintiff's
9 Complaint?
10 Now, I'm going to tell you how it is that
11 Plaintiff claims the Defendant is negligent.
12 And what I'm reading are essentially the
13 allegations set forth in the pleadings. This
14 doesn't prove anything, what I'm saying that they
15 claim. Ultimately, you need to decide the case
16 based upon the evidence, your evaluation of its
17 weight and credibility.
18 As to negligence, the Plaintiff alleges
19 that the Defendant was negligent in one or more
20 of the following ways.
21 And let me make the point that, in order
22 to answer yes to Question 1, you must be
23 persuaded by a preponderance of the evidence that
24 the Defendant's negligent, in at least one of the
25 following ways.

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1 First, in avoiding testing of tobacco,
2 tobacco smoke, and cigarettes, that would be
3 likely to relate human disease to smoking.
4 Two, in processing, controlling and
5 manipulating the contents and proportions of
6 various substances in cigarettes in such a way as
7 to continue and/or enhance the habit-forming
8 and/or the addictive effects of those products on
9 users, specifically by: One, altering the pH of
10 cigarettes or cigarette smoke, so as to increase
11 the effect of nicotine; of two, controlling and
12 manipulating the amount of nicotine in its
13 cigarettes in such a way as to maintain the
14 physical dependence of Plaintiff and other
15 smokers on its cigarettes; or, three, adding
16 sugar to its cigarettes' tobacco, so as to
17 increase the effect of nicotine.
18 Each of the three items I just told you

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19 are one way the Plaintiff contends the Defendant
20 was negligent under part two. Any one of them
21 would be sufficient.
22 The third allegation of negligence is
23 that the Defendant was negligent in selling and
24 distributing cigarettes which it knew or should
25 have known contained poisonous and carcinogenic

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1 substances capable of causing and likely to cause
2 numerous serious and fatal injuries and diseases,
3 including but not limited to cancer of the lungs.
4 The fourth claim of negligence, in
5 selling and distributing products which it knew
6 or should have known contained habit-forming and
7 addictive substances capable of and likely to
8 induce irresistible habits and/or physical and
9 psychological dependence and addiction when used
10 in a foreseeable manner.
11 On Question 1, the Plaintiff bears the
12 burden of proof. The burden of proof is
13 preponderance of the evidence. Preponderance of
14 the evidence means the greater weight of the
15 evidence, what is more probably true than not.
16 It is that evidence, when weighed with what
17 opposes it, has more convincing force and is more
18 probably true or not.
19 So, in order to answer yes to Question 1,
20 Plaintiff must prove it is more probably true
21 than not that the Defendant was negligent in at
22 least one of the ways alleged which was a cause
23 of damage to Plaintiffs, as to cigarettes sold to
24 Jesse Williams on or after September 1, 1988.
25 And as to that term "cause," something is

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1 a cause if it is a substantial factor in
2 producing the result. A substantial factor is an
3 important or material factor; not one that is
4 insignificant.
5 That is Question 1. In order to answer
6 it at all, nine of you must agree.
7 If your answer is no, then your verdict
8 is for the Defendant on the negligence claim and
9 you're not to answer any more questions.
10 The presiding juror, that is one of you,
11 who you decide will be your official spokesperson
12 and the person responsible to fill out the form,
13 the presiding juror should then date and sign the
14 form, and that is the end of your deliberations
15 on Question 1, on the verdict form negligence.
16 Now, if nine of you at least agree that
17 the answer is yes, the instructions tell to you
18 proceed to Question 2.
19 Question 2 is a question on which the
20 Defendant has the burden of proof. In general,
21 the Defendant denies it was negligent and denies
22 that Plaintiff's claim of misrepresentation and
23 denies that it's liable for damages claimed by
24 the Plaintiff in this case.
25 The Defendant has also gone on to

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1 affirmatively allege that a substantial factor in
2 the cause of Mr. Williams' lung cancer and death
3 was his own negligence, in at least one of the

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4 following ways: First, Mr. Williams chose not to
5 follow warnings regarding the health risks of
6 smoking and advisory statements regarding the
7 benefits of quitting; second, Mr. Williams chose
8 not to quit smoking; third, Mr. Williams failed
9 and -- excuse me, Mr. Williams failed to seek
10 medical or other professional assistance to quit
11 smoking.
12 If you will look at Question 2, it asks
13 you to answer the following: Was Jesse Williams
14 negligent, as claimed in Defendant's answer?
15 That is one or more of the three ways I just read
16 to you. And, if so, was such negligence a cause
17 of Plaintiff's damages?
18 At least the same nine of you who agreed
19 on the answer to Question 1 would have to agree
20 on the answer to Question 2.
21 If you agree that the answer to Question
22 2 is no, the instructions tell you to skip
23 Question 3 and to proceed to Question 4.
24 But if you answer Question 2 yes, the
25 instructions tell you to go to Question 3 which

1 asks you then to make a finding of the relative
2 comparative negligence between both parties.
3 In other words, you'll be answering
4 Question 3 only if you find both that the
5 Defendant was negligent and that Jesse Williams
6 was negligent.
7 And, in that event, you are asked to
8 assign a relative percentage of negligence which
9 must total 100 percent, and which is governed by
10 the following Oregon rule of law.
11 Any person more than 50 percent
12 responsible, more than 50 percent negligent in
13 causing one's self harm, cannot recover damages
14 under Oregon law.
15 So, the instructions tell you that if you
16 assign more than 50 percent negligence to
17 Mr. Williams, that is itself a verdict for the
18 Defendant and you are not to go any further.
19 However, you if you assign 50 percent or
20 less to Mr. Williams, the instructions tell you
21 to go to Question 4.
22 Question 4 asks you to assign damages.
23 Now, remember again that the same nine of
24 you who tracked through Questions 1 and 2, if you
25 are answering Question 3 would have to agree on

1 3.
2 And then you get to Question 4, which is
3 a question about compensatory damages.
4 Compensatory damages are one kind of
5 damage sought in the case. The other kind is
6 punitive damages. I'll get to that in a minute.
7 But right now compensatory damages are
8 two categories, economic and non-economic.
9 Compensatory damaged are designed to
10 compensate the Plaintiff for damages that are
11 allowable for recovery in an action like this
12 under Oregon law.
13 The economic damages are for medical
14 expenses, treatment and burial expenses. The

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15 amount is not in disagreement. I don't have it
16 in front of me right now, but I'll get it to you
17 to have it for you at the end.
18 If you are answering Question 4, if you
19 have found the Defendant negligent and that the
20 Plaintiff is entitled to recover, these parties
21 have agreed on what number goes there. It's some
22 $21,000, but I'll give you the exact number.
23 It's not in dispute.
24 What's in dispute is whether the
25 Defendant's negligent and whether Mr. Williams

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1 was negligent in causing the damage.
2 The second item, non-economic damages,
3 those are defined as subjective, non-monetary
4 losses sustained by the Plaintiff as the result
5 of his death.
6 And in this category there would be
7 damages claimed for the pain and suffering and
8 disability of Mr. Williams, himself, while he was
9 living, and then claims by his estate, his wife
10 and his children, for loss of his society,
11 companionship, services, love and affection and
12 so forth.
13 There is an upper limit to the amount you
14 can award there. It is $1 million dollars. At
15 least the same nine of you who agreed previously
16 would have to agree on this.
17 The final questions on the negligence
18 verdict form go to the issue of punitive damages.
19 Punitive damages are not compensatory
20 damages. They are not designed to compensate.
21 They are designed to punish and deter behavior.
22 There are particular standards that
23 apply, which I will tell you about at the end of
24 the case. But there is a different burden of
25 proof that applies to punitive damages.

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1 First, the question whether to award
2 punitive damages is something that is solely
3 discretionary on your part, and there are
4 standards you would consider in deciding whether
5 to punish.
6 And, secondly the amount of punitive
7 damages that you award is also to be governed by
8 the standards I'll give you at the end of the
9 case.
10 The claim for punitive damages, however,
11 must be proved by a standard called clear and
12 convincing evidence.
13 Clear and convincing evidence is a higher
14 standard of proof than preponderance or mere
15 probabilities. Clear and convincing evidence is
16 the evidence that enables you to find that the
17 facts alleged are highly probable, not just more
18 probably true; highly probable.
19 On that issue then there's a different
20 burden of proof than on the earlier questions.
21 That is the negligence verdict form.
22 The misrepresentation verdict form asks
23 you first to answer the question: Did Defendant
24 make false representations concerning the causal
25 link between smoking and cancer upon which Jesse

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1 Williams relied? And, if so, were such false
2 representations and reliance a cause of damage to
3 Plaintiff as to cigarettes sold to Jesse Williams
4 on or after September 1, 1988?
5 A claim for misrepresentation, under
6 Oregon law, requires that the Plaintiff prove by
7 clear and convincing evidence the following
8 elements, all of them: First, that the Defendant
9 made false representations concerning the causal
10 link between cigarette smoking and cancer;
11 second, that the false representations Defendant
12 made were material; third, that the Defendant
13 knew the representations were false or recklessly
14 made the representations without knowing they
15 were true or false; fourth, the Defendant
16 intended to mislead or recklessly disregarded
17 whether it was misleading consumers of its
18 products, including Jesse Williams; fifth, Jesse
19 Williams reasonably relied on Defendant's false
20 representations in smoking Marlboro cigarettes on
21 or after September 1, 1988; and, finally, the
22 Defendant's false representations were -- excuse
23 me, Jesse Williams' reliance on Defendant's false
24 representations were a cause of damage to the
25 Plaintiff.

1 Now, essentially in the misrepresentation
2 claim in the Complaint that the Plaintiff filed,
3 the Plaintiff alleges that the Defendant is
4 liable for misrepresentation and asserts that
5 each of the elements that I have just read to you
6 are proved under the evidence that you have
7 heard.
8 The proof here must meet the higher
9 standard called clear and convincing evidence.
10 The Defendant denies there were
11 misrepresentations and denies that it is liable
12 for misrepresentations.
13 Question 1, in order to answer yes, you
14 must find that the Plaintiff has proved by clear
15 and convincing evidence that the Defendant made
16 false representations in each of the six elements
17 I just read to you, which I'll read to you again
18 at the end of the case.
19 The Plaintiff has the burden of proof on
20 that claim. Nine of you, at least, have to agree
21 in order to answer that question either way. It
22 could be a different set of nine than agrees on
23 the verdict in the negligence case.
24 If your answer is no, don't answer any
25 more questions. That is the end of the

1 misrepresentation claim.
2 If your answer is yes, proceed to
3 Question 2, which is a compensatory damages
4 question, identical to the compensatory damages
5 question on the negligence form.
6 And then Questions 3 and 4 are punitive
7 damages questions, identical to the punitive
8 damages questions on the negligence form.
9 Again as to punitive damages the goal is
10 to punish and deter, not to compensate.

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11 The burden of proof for all of the
12 misrepresentation verdict form is clear and
13 convincing evidence. The same nine of you who
14 answer more than one question have to agree on
15 all of the questions.
16 In short, that is the task that lies
17 ahead of you after the arguments you are about to
18 hear.
19 Jurors, we have had several weeks of
20 evidence. The evidence started with the
21 presentation of the first witness who testified,
22 under oath, in your presence, and it ended this
23 morning.
24 The lawyers spoke with you up front
25 during jury selection. They made opening

1 statements to you. And now they are about to
2 address you as advocates about what they believe
3 the evidence has or has not proven.
4 I trust that what they are about to tell
5 you will be helpful to you in evaluating the
6 evidence and in beginning to formulate your
7 thoughts for purposes of deliberation.
8 But remember that the lawyers are not
9 witnesses. If their recollection of the
10 testimony is different from how you remember it,
11 ultimately you're the judges of the evidence.
12 They'll do the best they can to recall the
13 evidence and to assist you in understanding their
14 particular theories.
15 Mr. Gaylord, are you ready?
16 MR. GAYLORD: Yes, Your Honor.
17 THE COURT: You may proceed.
18 Question.
19 A JUROR: Before we start, may I use the
20 restroom?
21 THE COURT: Yes.
22 Just stand at ease, folks. Jurors.
23 * * *
24 (Whereupon, after a momentary pause in the
25 proceedings, the afternoon session continued,

1 as follows:)
2 * * *
3 THE COURT: All right.
4 Mr. Gaylord.
5 MR. GAYLORD: Thank you, Your Honor.
6 * * *
7 PLAINTIFF'S CLOSING ARGUMENT
8 * * *
9 MR. GAYLORD: May it please the Court,
10 Mrs. Williams, opposing counsel, ladies and
11 gentlemen of the jury.
12 As you can see, we have altered the
13 courtroom a little bit for this part of the
14 proceeding. I feel like we shrunk the back part
15 and enlarged the front part. And it's for no
16 particular reason other than we are going to be
17 addressing this whole part of the presentation
18 directly to you, and it seems a little freer to
19 move around this way.
20 I did bring back out this exhibit that we
21 started off with in the opening statements. I

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22 would suggest that you not be too anxious about
23 how well you can see it or whether you can see
24 it. I really didn't make use of it during the
25 trial. And I'll be honest with you. I was sort

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1 of, when I put it up in opening statements, it
2 seemed like it blocked out the sky, and I was not
3 that happy with its usefulness for that reason.
4 I brought it back just because it's what
5 we started with. I believe we could build an
6 argument around it and say we have been through
7 this whole path and we have gone through all of
8 these documents and it's all there, and the track
9 record will show itself that way.
10 But I'm going to do it a little
11 differently than that. It's just there because I
12 wanted to give you some continuity before we
13 started.
14 We have also -- I hope the alternate
15 jurors don't feel down-sized. This is just part
16 a matter of opening up the courtroom, and the
17 smaller TV seemed like it would work there.
18 In advance of when I get there, I will
19 ask you to forgive me, to the extent I dwell on
20 documents that you have seen and heard all you
21 need to from me. I can't tell that from where I
22 am. I think the documents speak greatly for
23 themselves.
24 I don't mean to bore anybody to tears.
25 This part of the process is referred to as

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1 summing up. So, my intent, when I do talk about
2 documents and show some of them, is to show you
3 on a flip chart the list of them, show you some
4 things about how we have tried to make it easier
5 for you to find what you might want to and the
6 ones that we are going to mention.
7 There are many, many more documents in
8 evidence than I'm going to talk about. And when
9 I talk about them today, it's going to be to
10 breeze past them really.
11 I'm going to ask Mr. Thomas to put some
12 of the highlighted portions you have seen up on
13 the screen when we get there, but I'm not going
14 to take the time to read them to you or have you
15 read them particularly.
16 It's more a matter of letting you make
17 sure your notes are what you want them to be and
18 you can find what you want later, if you choose
19 to do that approach.
20 You will find when you get to the point
21 where you have the evidence in your hands that
22 the highlighting, the yellow stuff that you have
23 seen on the documents, won't be there.
24 So, I'll turn to that just now and tell
25 you what we are going to offer.

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1 There are several notebooks of the
2 Plaintiff's exhibits in the case. I think
3 there's 180 or something like that of them,
4 total, and probably some missing numbers because
5 of the way things go in the trial.
6 But what we have been doing is putting

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7 these little yellow tabs so that if you care to
8 find the part you have seen before that was
9 yellow highlighted, at least the tabs will orient
10 you to that same part. Obviously, you can read
11 whatever you find in here to read, and it's up to
12 you to choose how to do that.
13 But it's appropriate that you not be
14 given highlighted exhibits because that takes
15 things out of context for you. Yet, we want you
16 to be able to find where we were with them and
17 not have to read. Some of these are long
18 documents. So, that is what you are going to
19 get, and it will just have that set of tabs for
20 that reason.
21 A JUROR: Your Honor, am I missing
22 something? I don't see yellow tabs.
23 MR. GAYLORD: If I said yellow, no.
24 There were yellow. We had yellow highlighted
25 them as we have shown them to you, and in that

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1 set is what we'll be using as I show you some of
2 them this afternoon. So, you're going to see the
3 yellow again today. No, the tabs that I was
4 pointing out there are, it looks like, are green
5 and yellow, or green and red. And no, they are
6 just there to try to give you the place to turn
7 the page and see if somewhere pretty close to
8 that tab is where our stuff came from that you
9 have seen before in yellow. Okay.
10 Now, I began this trial, in terms of the
11 official record of the trial, in opening
12 statement four weeks ago, I think four weeks ago
13 today, with the statement: This is a case about
14 a company whose executives made choices that
15 contributed to the largest preventable epidemic
16 in U.S. history.
17 I expect you at least appreciate now why
18 I said that. And that is not to take for granted
19 your conclusions about the whole case or where
20 any of you are in your assessment of the
21 evidence.
22 You still have hard work to do, and that
23 needs to involve serious discussions and
24 deliberations, and that is going to be your task;
25 not mine.

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1 But I dare say I think each of you have
2 seen enough evidence so that I should be
3 confident in saying you should know why we are
4 here, why we have brought this process, and set
5 out on this course.
6 The role that you have when you take over
7 the burden of this case from us, and we lawyers
8 put it on your shoulders and stand back, is a
9 role that deserves comment before you undertake
10 it and before I turn it over to you and we all
11 do.
12 And I don't think it's too strong a
13 statement to say that this is the ultimate role
14 of self governance in the American democracy,
15 what we ask you to do.
16 Now we all grew up and learned in school
17 about what a great place we have here to live and

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18 what a great government we have and how democracy
19 is the best.
20 And we also all know and think of that in
21 terms of the ballot box that we can go vote on
22 measures and we can go vote on people to be in
23 positions. And that is what we think of most of
24 the time as the democracy in action, government
25 of, by and for us.

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1 You have all answered the call,
2 remarkably, to this point in time. I think it's
3 probably not apparent to you, but to us lawyers
4 in the courtroom, we all recognized that it is
5 remarkable in that none of you have dropped out,
6 none of you have been tardy. To the extent that
7 there have been hold ups, it's what we are doing
8 in the courtroom. Not anything that you have
9 ever done to slow us down. Your attention and
10 engagement in the case is impressive, and we all
11 appreciate it. I know both sides do.
12 I dare say none of you will probably ever
13 forget this experience, not just because it's a
14 five-week chunk out of your life that you don't
15 get to choose to do.
16 I think you're going to see, as you go
17 forward and talk about it, that this is an
18 opportunity, unlike anything else that our
19 government provides, as an opportunity for you to
20 be the governors of an important issue, for you
21 to decide things between ordinary people and an
22 important company that have important
23 ramifications beyond this courtroom, beyond these
24 people, and for a long time to come.
25 And each of the votes, you think about

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1 that, each of you could be the one-ninth or tenth
2 or 11th or 12th of a verdict in this case, which
3 means that your vote probably is many times more
4 powerful than any vote you ever cast in the
5 ballot box.
6 We always imagine we might be the one
7 vote that mattered in the outcome of an election,
8 but seldom does it ever happen and seldom our
9 election is ever decided by the number of votes
10 that you all have collectively here to cast.
11 It's as though you have been selected
12 from our citizenry to set the standards and apply
13 them for corporate behavior toward consumers, on
14 really a broader scale than really the very wide
15 marketplace for cigarette products.
16 You have in your hands the power to
17 direct the attention where it will do the most
18 good and to set the way ahead in the next century
19 for policy makers, corporate movers and shakers.
20 As I will explain later this afternoon,
21 you really don't have a choice whether you set a
22 tone and send a message in this case. Whatever
23 you decision is going to be, it's going to have
24 ramifications to the movers and shakers in the
25 corporate world and the standards of behavior.

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1 Silence is not an option. Your voices
2 are going to say to the rest of us either what

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3 this cigarette company has done is acceptable or
4 it's not.
5 In the face of the evidence, in as strong
6 and unambiguous as I think we have presented to
7 you, that answer is not going to be modest either
8 way. It can't help but be a bold statement,
9 given the context in which it is going to occur.
10 Either something needs to be changed for
11 the future or everything that has happened to
12 date is fine with you. And we'll probably
13 continue and be repeated by other companies in
14 other settings as well.
15 Mrs. Williams knows that you are going to
16 work hard. She trusts that you will take your
17 time and carefully work your way through the
18 issues, sort out the facts, reach the decisions
19 we can all honor as the best of American justice.
20 Now, I already commented on why we are
21 here, probably briefly, but I want to get more
22 detailed about it.
23 I'm going to, again, I'm going to
24 surmise, you know, I haven't sat in the jury box
25 and I haven't been through the case from your

1 standpoint, but I'm going to imagine that most of
2 you have been through some changes since the
3 first days of this trial, so that you would have
4 some difficulty looking back on the issues we are
5 going to be talking about the same way you might
6 have before you heard the evidence.
7 Obviously, that is intentional. That is
8 what the evidence is for.
9 I'm reminded of the word that some of the
10 witnesses used, a couple of them, I think two or
11 three different people used presentism; and, if I
12 gather what they are talking about, it's not a
13 word I'm familiar with. But I think they are
14 saying from a point in time today it's hard to
15 place yourself in point in time earlier and say
16 what did I know or what did anybody know at that
17 point? Our attitudes towards what we know sort
18 of sweep along with us. And when we know
19 something today, it's hard to remember that we
20 didn't know it early earlier.
21 But you might ask yourselves to try to
22 remember now which facts about tobacco,
23 cigarettes, the cigarette company, and smoking
24 and health you did not know when we started.
25 And think about "know" in more than one

1 dimension. We have heard people say "know" and
2 "believe" are two different things.
3 We all know that there are levels of
4 knowing things. You can have a kind of sense of
5 something being true and not know anywhere near
6 what that really means and what its true impacts
7 are on an issue. And I think smoking and health
8 is one of those kinds of issues.
9 So, one simple reason to say why are we
10 here, why this case had to be brought, is just
11 about that.
12 You, at least some of you, and many
13 people, did not know what there was to learn from

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14 formerly secret documents from Philip Morris.
15 Now, Philip Morris lawyers suggested a
16 few times that it was through the community
17 spirit of Philip Morris that these papers have
18 come into our hands and your hands.
19 Their witnesses admitted, when asked,
20 that it was the result of long, hard battles in
21 court. Mostly, all of them.
22 These incriminating documents became
23 available so that a jury could ever get to make
24 this decision, armed with even some of the real
25 facts.

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1 So, we come into the court partly just to
2 make sure it's done by someone and the truth gets
3 told in a public place. Time honored is the
4 right place for the truth to echo and resound and
5 become part of common knowledge.
6 Again, you can't be silent on a question
7 like that. When you're done, common knowledge
8 will be somewhere else, one way or the other.
9 I'm going to come back later, but just a
10 foreshadowing, I guess. If anyone believes that
11 common knowledge for the last four decades
12 contain the full truth, that everything a hooked
13 smoker needed to make the best choices for
14 themselves, well, I guess, you'll tell us that as
15 a message in your decision.
16 But if that is where you are and you
17 believe that has been the truth, we haven't done
18 our job.
19 Another reason we are here, and the
20 second one, I'm going to suggest, as an extended
21 preface of where we are going, is to complete
22 Jesse Williams' mission. You learned in evidence
23 that hasn't been contested how Jesse Williams
24 realized finally what had happened to him, as the
25 price of his loyalty and trust to Philip Morris,

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1 and he couldn't rest in peace without knowing
2 someone would carry forward his desire to
3 challenge Philip Morris' conduct, to make it
4 possible the same thing might not happen to
5 someone else for believing a cigarette company's
6 lie.
7 Now, even though he and his family have
8 accepted his responsibility for what he went
9 through, that is not even half of the story.
10 That is not the half of the story that we are
11 here about.
12 So, we are here to fulfill his wish that
13 this case seeks to make a statement for the
14 public health for those as-yet-unknown pawns in
15 Philip Morris' profit end game.
16 Now, Judge Brown has covered the subject
17 that I have a moment noted in my notes to deal
18 with now, which I'm going to call the legal fit,
19 the legal requirements of what we set out to
20 prove.
21 If my college and I can make this thing
22 work one more time, I'm going to put my notes
23 right on here, and it doesn't cover it all, but
24 I'll just work my way through it quickly.

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25 The first theory of the case that I'm

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1 going to mention, and again just to kind of give
2 you a road map where we are going, is negligence,
3 which is another way of saying violation of its
4 duty of care which always comes down in legal
5 parlance to failure to act reasonably under the
6 circumstances.
7 Reasonableness is the operative word
8 whenever there's analysis of negligence.
9 Now, the specifics of what we say this
10 manufacturer did that was not reasonable care to
11 avoid harm to others was manipulating cigarette
12 ingredients, adding ammonia to raise pH,
13 controlling nicotine, adding sugars, and
14 acetaldehyde is this word down here.
15 And I don't know how of the chemistry we
16 need to understand any of this except to be
17 reminded, through Dr. Farone and others, we
18 understand that when you add sugar, and the
19 documents will again remind us of this, add sugar
20 to the contents and burn it, sugar produces
21 acetaldehyde.
22 Some of the documents we have show that
23 that was a manipulation that was being studied by
24 Philip Morris, and testimony establishes that
25 that is a thing that is done because it enhances

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1 the nicotine hit or kick.
2 Avoiding biological testing. We'll talk
3 about the gentlemen's agreement as we go through
4 and remind you of that. But that is just one of
5 the things that they did that we tell you is an
6 unreasonable thing in our assessment of the
7 corporations's responsibility.
8 Selling a product known to kill.
9 Selling an addictive product.
10 I'll talk more about those.
11 We have, of course, responsibilities to
12 our case and to you to show that the breach of
13 duty caused damage and to tell you what those
14 damages are. I'll come back to damages later,
15 both compensatory and punitive damages.
16 I'll just tell you the compensatory
17 damages are what is sought on behalf of the
18 estate. Our law allows compensation of a loss;
19 it's the result of some other party's behavior.
20 That is negligent.
21 Punitive damages, which I'll spend time
22 on close to the end of my comments, is not to
23 compensate. It is an assessment against a party
24 for modification of behavior purposes. I'll talk
25 more about that.

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1 You heard Judge brown talk about
2 cigarettes sold to Jesse Williams since September
3 1, 1988. And that is just you just have to
4 accept that as a legal rule. I don't want to say
5 technicality, but there's no explanation for it
6 other than that is our law.
7 Our claim is restricted to the last eight
8 years of the product purchases, and that is why
9 we put on evidence that I'll mention later in

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10 more detail that specified that timeframe.
11 We wouldn't ask people did the last eight
12 years of cigarettes substantially contribute to
13 Jesse Williams' cancer and death, if it wasn't
14 for that legal touchstone that we have to cross
15 paths with. So, that is what that is about.
16 It is not that the conduct has to have
17 been within the last eight years by the Defendant
18 either with respect to the negligence or the
19 misrepresentation claim.
20 It's that it has to have played a role in
21 his purchasing of those cigarettes, and those
22 cigarettes have to have played a royal, as the
23 Court's instructions were explained, in his
24 cancer and death.
25 Well, let's see. This is -- this is my

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1 notes on misrepresentation, my handwritten note
2 over here. It just says show instruction because
3 I'm going to do that in a second. That is to me.
4 The misrepresentation part of the case
5 and the instruction I'm going to show you is the
6 one about half truths so you understand there's a
7 legal basis for that concept being used here.
8 But again, this is an alternative way to
9 say Philip Morris is at fault and legally
10 responsible for Jesse Williams' cancer and death.
11 And the false representations include
12 these are, of course, paraphrasing, grossly
13 restricted, but from the real words, but
14 representations there's no proof cigarettes cause
15 cancer, "creating doubt about the health charge
16 without actually denying it."
17 That is in quotes because that is what
18 one of the documents says.
19 And finally, in recent years saying
20 cigarettes are a risk factor, not a cause, as
21 though that was in fact a difference, a material
22 difference on this issue.
23 Philip Morris knew its representations
24 were false. That is there to show you that we
25 have to accept and meet the burden of proving

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1 that they knew that.
2 And a fair amount of evidence in the
3 documents just does that. It's here because it
4 shows what they actually knew, contrary to what
5 they said.
6 1958. Philip Morris scientists. That is
7 just a reminder of the things that show that they
8 knew that was false. 1958 is a document, I'll
9 mention again and give you the specific number in
10 a minute, where British scientists came over to
11 the United States and interviewed scientists from
12 a long list of companies and universities, and
13 the statement says, with one exception, the name
14 is given, and it's not relevant, with one
15 exception all of the scientists agree smoking
16 causes lung cancer.
17 Philip Morris made these statements
18 intending to mislead smokers. We know that for a
19 lot of reasons, but here's one that quotes, and
20 again I'll give you the specific document when we

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21 get to it on my list later, quote, "they were
22 going to, quote, "provide a psychological crutch
23 and self-rationale to continue smoking."
24 Jesse Williams relied -- we know he
25 relied on these statements because he told his

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1 family that they wouldn't be selling these things
2 if they were harmful to my health.
3 And then in the most poignant statement,
4 when he had had his diagnosis, when he basically
5 set his widow on this mission, he made those
6 statements that you heard, and I won't try to say
7 them precisely, because I don't have them in my
8 notes, but I have the sense of them in my mind,
9 he felt betrayed and wanted to do something about
10 it.
11 And, of course, the last thing we take on
12 to prove there is damage. There's no dispute
13 that he had lung cancer and died from it. We'll
14 talk more about what is disputed about whether or
15 not the cigarettes were the cause of it.
16 I said I would show you that instruction
17 and let me slip to that right now. I'm not going
18 to do this more than just this once, because the
19 Court's instructions will be given to you
20 verbally and I think in a transcripted form.
21 But this one is particularly useful when
22 we come to talking about it, and I don't know if
23 you can read this or not, but I'll read it to
24 you. This is the instruction called
25 Misrepresentation; Half Truth.

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1 When a manufacturer makes representations
2 to its consumers in the nature of half truths,
3 the failure of the manufacturer to make a full
4 and fair disclosure of the truth may be a false
5 representation.
6 And what that is telling you is that that
7 may meet the burden for this particular theory of
8 liability that maybe what it takes to get you
9 there.
10 And I wanted to emphasize that because we
11 think a lot of the evidence we have is in the
12 nature of half truths.
13 One of the rules you will also hear,
14 while I'm talking kind of the legal stuff that
15 goes behind what your job is going to be now, I
16 don't want to skip over this one, we have told
17 you from the very first that Jesse Williams and
18 his family accept some responsibility here.
19 I have told you again this morning that
20 what the case is about really is that Philip
21 Morris has never accepted any responsibility here
22 or elsewhere for any of the health effects of
23 smoking.
24 There is a thing called comparative
25 negligence. On the first theory that we talked

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1 about, and that Judge Brown summarized to you in
2 the verdict form, negligence. There is a
3 question on that form for you to answer: Was
4 Jesse Williams negligent? And then you do a
5 percentage that has to add up to 100. So, you

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6 split whatever your consensus is, how much
7 negligence is Philip Morris' and how much is
8 Jesse Williams'.
9 I bring it up here just so that you're
10 clear on one point. The Judge will certainly
11 tell you this, too. But I think as I go forward
12 it's worth having you think in these terms as you
13 go with me and sum up the evidence.
14 It is a 50-50 rule. If, in Oregon, if
15 Jesse Williams is more than 50 percent at fault,
16 we lose on the negligence claim. And that is --
17 so that is a consequence of your calculation of
18 that.
19 If he is 50 percent or less at fault,
20 then ultimately he recovers that percentage that
21 is their fault of the compensatory damages that
22 you award.
23 I mentioned the eight years. There is
24 another aspect of the case that hasn't been
25 emphasized particularly yet, and I'll just spend

1 a moment on it covering the legal parts, and I'll
2 be done with the legal parts then.
3 And that is when Philip Morris says it's
4 Jesse Williams' negligence here, this is what
5 they say.
6 And my page says: Why Philip Morris says
7 Jesse Williams was negligent. This is a
8 paraphrase of, of course, longer somewhat more
9 complicated language, but these are the parts of
10 what they say makes this Jesse Williams' fault:
11 One, he didn't follow warnings that
12 suggested quitting;
13 Two, he didn't quit smoking.
14 Three, he didn't seek medical help to
15 quit smoking.
16 And, I'm going to tell you, I don't think
17 that is anything more or less than Jesse Williams
18 was negligent because he smoked Marlboro
19 cigarettes.
20 Now, you are going to have deal with what
21 you think of that assessment, but I'm here to
22 tell you if you tell somebody they are at fault
23 because they bought your product and used it as
24 you expected them to -- and let's make this point
25 clear. There's a lot of lawsuits against product

1 manufacturers. And a lot of times people come in
2 and say I got hurt or I got made sick and I used
3 your product.
4 And very often the fair thing for that
5 product manufacturer to say, and the true thing,
6 is it's your fault. You misused our product.
7 You did something wrong with it. You did
8 something that made it break or that made it fail
9 or that simply made you get hurt because that is
10 not what it's supposed to be done with. That is
11 not how it's supposed to be used. And that is a
12 classic dispute, and that is where negligence of
13 the user of the product usually comes to rest.
14 And jury's have to decide or cases get
15 worked out and resolved or settled or something on
16 the question, is that true, did they really misuse

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17 the product?
18 Find for me, if you can, where in Philip
19 Morris' defense of this case they have any basis to
20 say Jesse Williams misused any product of theirs?
21 I'm not the first person to say it, and
22 whether this is the right place in my notes to say
23 it or not, I'm going to say this is the product of
24 them all, legally sold, which when used precisely
25 as intended, according to instructions, it will

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1 cause you to get sick and die.
2 When you get into your work on the
3 evidence in the case, lots of it is documentary.
4 There's a reason for that. For the most part,
5 these secrets would still be secret if it weren't
6 for the documents that have been ferreted out, and
7 it is the documents that tell us the truth about
8 the last several decades. So, documents are the
9 core of a lot of our evidence.
10 But there is a very strong body of
11 evidence from the mouths of very good witnesses in
12 this case. One of the things that is sometimes
13 overlooked, and I'll mention this just so I get my
14 chance to tell you what I think about such things,
15 the quality of evidence is in your hands. None of
16 the rest of us can tell you what to think of it.
17 We can comment all we want. But you get to, and
18 you probably have to, think not just in volumes of
19 evidence.
20 Our instructions say weigh the evidence.
21 Well, what's an ounce of words versus an ounce of
22 words? You weigh the evidence because you decide
23 for yourselves who you think told it to you
24 straight.
25 And you sometimes have witnesses that

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1 just you can't reconcile. You can't say there's a
2 way to say they are both trying hard to say the
3 same thing. They both see things differently.
4 They can't both be right. So, it's going to be
5 your job to think back to these witnesses. And
6 ours are, some of them, a long time back, but you
7 have got to think through how they struck you at
8 the time. You have got to think back.
9 And remember Dr. Benowitz and Dr. Pollay.
10 Dr. Benowitz was the first witness, a
11 very knowledgeable man about smoking and addiction,
12 been involved in many Surgeon General's reports,
13 and a very high-quality scientist.
14 Dr. Pollay was the man from British
15 Columbia, who was the first ever to have access to
16 the archives of Hill & Knowlton.
17 Remember Hill & Knowlton? Hill &
18 Knowlton was the PR firm that was hired in the
19 early '50s by the Tobacco Industry and whose hands
20 on the puppet strings are shown through a lot of
21 the documents that have come forward.
22 Dr. Farone. I don't think anybody saw
23 any more impressive testimony than Dr. Farone, a
24 very high-class chemist. And, most interestingly
25 there, a very high class chemist from 1976 to 1984.

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1 I'm intentionally skipping lightly over

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2 the tops of the contents of these testimonies right
3 now, partly because I have got to choose what to
4 spend time on, and I could go on for days, if I get
5 into the details of what they said, and you
6 probably have better notes and memory than I do.
7 When you are involved with exchange of
8 the witnesses, you find yourself afterwards saying
9 what did we say and what did they say? I can't
10 remember. I now what we wanted to say. But I
11 can't bring it back. You have got notes on that,
12 and you have got your memories on that.
13 But don't hesitate, don't be afraid to
14 say I was impacted by witness A. And maybe there
15 is another witness or two out there on the same
16 subject, but they don't hit me that way. They
17 didn't make me believe differently. That is the
18 quality thing you have got to do.
19 You can think in terms of witness's
20 motivations, as well. Now, I suppose it's fair to
21 say some witnesses come in with a public health
22 chip on their shoulder, if you will. There are
23 witnesses who have come forward with us, and I
24 believe every one of them is a quality, high-class
25 educated and experienced, knowledgeable person.

1 And I think they presented that way, and I don't
2 think you got a lot of hyperbole out of our
3 witnesses.
4 And I hope, in terms of a style of
5 presentation from our team, me and Mr. Thomas
6 primarily, I hope we didn't blow fog over the whole
7 thing for you by our style of presentation at any
8 point.
9 I would like to say we would rather have
10 been straightforward with you and presented stuff
11 so that you could hear the witnesses and what they
12 have got to say, rather than our anxieties or upset
13 with what a witness was saying, particularly in
14 cross-examination, I hope we didn't take on a
15 witness in some way that made you feel like what we
16 doing to that poor person? That would not have
17 been our goal; and, if we did, I apologize.
18 But you can think about the things that
19 bring witnesses here. You can think about the
20 resources behind some of the witnesses. You can
21 think, for example, why does a man who is basically
22 a historian get paid for 70 hours a month, for 12
23 months, at $120 an hour, which, if I'm able to do
24 arithmetic, anymore, is $100,800, for two, a little
25 more than two hours of direct testimony about what

1 it says in the Oregonian?
2 That's not -- I'm not channeling Dr. May
3 for what he did. I think he was pretty
4 straightforward about what he did. But why did we
5 have that evidence to prove to us that it was
6 common knowledge by the 1950s that smoking causes
7 something? Nothing really specified. Causes some
8 form of harm.
9 And I asked him didn't he find it ironic
10 that he was here with those sort of resources to
11 establish for us the truth of a proposition that
12 the Defendant denies now, the current time?

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13 I won't go through any other witnesses
14 about those sorts of things, but you can think back
15 to what did we learn about what people are being
16 paid? What motives them to be here?
17 Now, I'm going to turn, and I hope it
18 isn't too backward to say, but I'm going to turn to
19 the story of Philip Morris as unraveled in some of
20 these documents. And again, this is going to be
21 not very well story told. I apologize. It's going
22 to be mostly about reminding you of documents.
23 It's going to be hopefully useful to you
24 to know, when you get to the work you've got to do
25 behind close doors, at least some of the places to

1 look for some of the important information.
2 I want to say about the documents I
3 wouldn't be surprised if we hear further argument
4 to the effect that gee, there's thousands,
5 thousands, maybe millions of documents, and it's
6 only these that have been picked out.
7 Well, some of the time these are picked
8 out because they are the top executives of Philip
9 Morris saying them. Almost all of the time they
10 are in the upper echelons of information and policy
11 at Philip Morris.
12 But also these are the documents that
13 tell what they were thinking when they didn't think
14 anybody was listening, when they didn't think
15 anybody was going to read what they wrote.
16 You don't, I guess, expect to see that
17 kind of statement every time they write something
18 down. And we haven't, by any means, gone past the
19 tip of the iceberg in terms of what there is in
20 incriminating information out there. We had to
21 pick and choose. We had to try to keep this
22 amenable. We didn't want to put you through a
23 six-month trial. And we have tried to be selective
24 about the statements that we brought to you.
25 For all I know, there's lots more of them

1 out there.
2 I don't believe it's about what
3 percentage of all of the documents are
4 incriminating. I don't believe it takes that kind
5 of assessment to say did they or didn't they know
6 these things? Did they or didn't they make these
7 choices and make them for purposes of their
8 profits?
9 THE COURT: Mr. Gaylord.
10 MR. GAYLORD: Yes.
11 THE COURT: Would this be a good place
12 before you start that story?
13 MR. GAYLORD: It might be.
14 THE COURT: Jurors, obviously, we need to
15 take an afternoon break, and I hope this is an
16 appropriate point for you, too.
17 Leave your notes here. 15 minutes.
18 Anything for the record?
19 MR. COFER: Nothing, Your Honor.
20 MR. GAYLORD: No, Your Honor.
21 THE COURT: All right.
22 We are in recess. 15 minutes, please.
23 * * *

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(Whereupon, after the recess, the remaining proceedings were reported by Katie Bradford.)

STATE OF OREGON)
) ss.
County of Multnomah)

I, Jennifer Wiles, hereby certify that I am an Official Court Reporter to the Circuit Court of the State of Oregon for Multnomah County; that I reported in Stenotype the foregoing proceedings and subsequently transcribed my said shorthand notes into the typewritten transcript, pages 1 through 141, both inclusive; that the said transcript constitutes a full, true and accurate record of the proceedings, as requested, to the best of my knowledge, ability and belief.

Dated this 15th day of July, 1999 at Portland, Oregon.

_____
Jennifer Wiles
Official Court Reporter

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